SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 464

L. W. HOLT, ET AL., PETITIONERS,

vs.

VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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[fol. 5] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

In Re: E. A. Dawley, Jr.

In Re: L. W. Holt

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR—
Filed March 30, 1962

Now come E. A. Dawley, Jr. and L. W. Holt and give notice of appeal from the judgment of this Court entered January 30, 1962 (which was duly excepted to), adjudging them guilty of contempt of court and sentencing them to pay a fine of $50.00, and set forth the following assignment of error:

The Court erred in:

1. Ruling that the Motion for Change of Venue was contemptuous of the Court, that Dawley was guilty of contempt of court in filing said motion, and that Holt was guilty of contempt of court in reading said Motion for Change of Venue.

2. Not disqualifying said Carlton E. Holladay from presiding over the said contempt proceedings, in which the conduct of the court was in question, and in permitting said Judge Carlton E. Holladay to preside over said trial.

3. Entrapping L. W. Holt by inviting and requesting said Holt to read and argue said Motion for Change of Venue and then adjudging him guilty of contempt for responding to said request and invitation.

4. Denying to Dawley and Holt the right to counsel and the opportunity to assert a defense to the said contempt charge.

5. Summarily adjudging Dawley and Holt guilty of contempt of court and in sentencing them to pay a fine of $50.00.

6. Failing and refusing to set forth with sufficient specificity, definiteness and certainty, the offense alleged to have been committed by Dawley and Holt.

E. A. Dawley, Jr., L. W. Holt.

* * * * * * *

[fol. 8]

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

In Re: E. A. DAWLEY, JR.

MOTION FOR CHANGE OF VENUE—Filed January 19, 1962

Now Comes the Defendant, E. A. Dawley, Jr., and represents as follows:

* * * * * * *

3. That the said Judge Carlton E. Holladay, who presided as Judge in said libel suit, and who fails and refuses to disqualify himself as Judge in the pending trial of the Defendant, E. A. Dawley, Jr., has, with respect to said contempt action and is now in effect and/or in fact acting as [fol. 9] police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.

4. That in addition to the foregoing, said Judge Carlton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq., the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with said Leonard W. Holt's participating in the defense of said

E. A. Dawley, Jr. in the contempt action; that part of said harassment and intimidation occurred at a hearing of this contempt action in the Hopewell Circuit Court on January 8, 1962, at which hearing the said Carlton E. Holladay revealed that he had been making an independent investigation and inquiry of Mr. Holt's conduct in this contempt defense, and said Judge at said place and time made the statement that he would "deal with" said Leonard W. Holt after he, the judge, had dealt with said E. A. Dawley, Jr.

• • • • • • •

E. A. Dawley, Jr.

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

[File endorsement omitted]

In Re: E. A. DAWLEY, JR., and L. W. HOLT, Attorneys—Contempt.

JUDGMENT—January 30, 1962

It appearing to the court that in the hearing in the premises of the rule against the defendant, E. A. Dawley, Jr., for contempt, this day heard, that the said E. A. Dawley, Jr. [fol. 10] and L. W. Holt, both practicing attorneys before this court, did in writing, representation and action commit a contempt against this court, and in this court, and before the bar of this court, as duly disclosed by the record in that said case which has been duly taken down and recorded, are accordingly found to be, and held, in contempt of this court, and each is fined the sum of Fifty Dollars, summarily, by the court for such contempt, and to the action of the court in finding and holding the said E. A. Dawley, Jr. and L. W. Holt, guilty of said contempt, they each excepted.

On motion of the said defendants for a suspension of the execution of the said fine herein imposed against them for contempt, in order that they may each appeal to the Supreme Court of Appeals of Virginia, the court doth suspend execution of said fine for a period of sixty days for this purpose upon the said defendants executing a good and sufficient bond in the penalty of Two Hundred Fifty Dollars, with surety to be approved by the Clerk of this court, and conditioned and payable according to law.

Said bond in each case having been this day duly executed, execution of said fine is hereby suspended in each case for a period of sixty days to permit application for, or perfection of, said appeal.

Thereupon each of the said parties were released from custody upon his respective bond as hereinabove recited, and upon the conditions aforesaid.

Carlton E. Holladay.

• • • • • • •

[fol. 13]

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

In Re: E. A. DAWLEY, JR.

In Re: L. W. HOLT

STATEMENT OF FACTS AND INCIDENTS OF TRIAL—January 30, 1962

1. On the 5th and 6th days of October, 1961, a law suit styled "*Hopewell News, Inc., Plaintiff* v. *Curtiss Harris et als., Defendants*" was tried in the Circuit Court of the City of Hopewell, Virginia, in which trial Judge Carlton E. Holladay presided, and the Defendants were represented by E. A. Dawley, Jr., an attorney at law qualified to practice in Virginia.

2. During the course of the aforesaid trial, subpoenas were issued on the 5th and 6th days of October, 1961, for the appearance on those days of the defendants, but said defendants could not be found by the City Sergeant to be served with said subpoenas. There were 12 defendants, when they could not be found the sergeant reported the fact and other subpoenas were directed by the court to be issued in the presence of E. A. Dawley, Jr. and the case carried over to the next day at 10 o'clock, at which time the sergeant again reported that the witnesses could not be found.

3. Thereafter, on October 6th the above case was dismissed agreed and a final order of dismissal was entered by the Court. While the order was being prepared Curtis W. Harris, appeared in the Court Room and conferred with his counsel E. A. Dawley, Jr.

4. After the order of dismissal was entered by the Court, Judge Carlton E. Holladay asked Dawley whether he, Dawley, had anything to do with the said witnesses being unavailable to be served with subpoenas, which question Dawley failed to answer. Although propounded to him three times, and requested the court to give him time to consider his answer, which the Court did, and directed him to appear on December 11, 1961, at 10 o'clock A. M.

The Court explained to him that the purpose of the questions was to ascertain whether or not the processes of the court—the service of the subpoenas for the witnesses had been thwarted or interfered with by his counsel or advice.

5. On December 11, 1961, said Judge Holladay issued a rule against Dawley requiring him to appear on January 8, [fol. 14] 1962 and show cause why he should not be held in contempt of Court for his refusal to answer said question, but said rule was not served on Dawley until after January 8, 1962.

6. On December 27, 1961, Dawley filed a motion requesting that Judge Holladay disqualify himself from acting as Judge in said contempt proceedings, a copy of said motion is attached hereto, made a part hereof and labelled Ex-

hibit A. On December 28, 1962, Judge Holladay overruled said motion and refused to disqualify himself.

7. On January 5, 1962, Judge Holladay was subpoenaed at the request of Dawley to testify as a witness on his behalf at said contempt trial.

8. Because Dawley had not been served with the said Rule to Show Cause prior to January 8, 1962, the trial date was rescheduled for January 30, 1962. His former attorney Leonard W. Holt stating at that time that he did not then represent him, and Dawley having not appeared.

9. On January 17, 1962, Dawley filed *pro se* a motion for a change of venue, said motion being attached hereto, made a part hereof and labelled Exhibit B.

10. On January 24, 1962, Dawley filed a civil complaint in the U. S. District Court for the Eastern District of Virginia at Richmond against said Judge Holladay et als. praying that Judge Holladay be enjoined from taking any further proceedings in said contempt action on the grounds that Dawley's rights under the Fourteenth Amendment to the U. S. Constitution were being violated by the conduct of said Judge Holladay.

11. That on January 30, 1962, the contempt trial came on for hearing, at which trial L. W. Holt, an attorney at law qualified to practice in this Commonwealth, represented Dawley; Judge Holladay presided. After hearing argument on motions the case was continued.

(Deleted by the Court. C.E.H., Judge. See Transcript of record hereto attached and made a part hereof. C.E.H., Judge.)

13. That immediately after sentencing, objection and exception was made by Dawley and Holt to the said actions of the court as being a denial of due process and equal protection of law under the Fourteenth Amendment to the United States Constitution and being contrary to the law and the evidence.

14. As corrected and amended and supplemented by the [fol. 15] transcript of the evidence made by Nancy W. Raiford, and hereto attached this record, statement and transcript of the oral testimony, facts and incidents of trial are signed.

....., Judge.

Ligon L. Jones, Commonwealth's Attorney.

E. A. Dawley, Jr., L. W. Holt.

Tendered to me this 30th day of March, 1962. The Court refuses to sign as tendered, the same being inaccurate, incomplete, and not a true manuscript or statement of the evidence, testimony facts and proceedings and incidents of the trial. The statement of the facts and incidents of the trial as set out in the hereto attached transcript made by Nancy W. Raiford are expressly made a part of the transcript of the record, testimony and incidents of trial in this matter and are to be read as a part hereof.

Carlton E. Holladay, Judge.

....., Judge.

Signed by me as amended and supplemented this 10 day of April, 1962.

Carlton E. Holladay, Judge.

The original statement of fact and incidents of trial are objected to as not being correct. The amended statement as modified by the court is agreed to.

Ligon L. Jones, Comm. Atty. City of Hopewell
4/10/62.

[fol. 16]

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

In Re: E. A. DAWLEY, JR.

In Re: L. W. HOLT

Transcript of Trial—January 30, 1962

PRESENT: Honorable Carlton E. Holladay, Judge, Mr. Ligon L. Jones, Attorney for the Commonwealth, Mr. L. W. Holt, Attorney, Mr. E. A. Dawley.

The following is a transcript of the testimony, facts and incidents of so much of the trial and proceedings against E. A. Dawley, Jr., as pertain to the proceeding wherein E. A. Dawley, Jr., and L. W. Holt were summarily adjudged to be in contempt of court, attached and fined on January 30, 1962.

Transcribed by: Nancy W. Raiford, Ivor, Virginia.

• • • • • • • —Denotes portions of dicta belts not transcribed as indicated above.

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The Court: There is one question that I would like to ask Mr. Holt. Mr. Holt, on the date of the previous hearing, which would have been—

Mr. Jones: December 11th, I believe, Judge.

The Court: The first one ahead of that, on October 10th.

On that date you appeared as counsel for Mr. Dawley in the proceeding that was here. In other words, as the record shows in that case, Mr. Dawley had been asked this question concerning whether or not he had any part in the witnesses not making themselves available for service of process which had been issued in court in this Newspaper case.

You appeared at that time and the case was set for December 11th, and I asked you how about December 11th. Mr. Holt said this would be acceptable, "may we at this time except to the record," etc.

Then on December 11th you appeared here and I have before me at the present time a transcript of the record on that. Do you have a copy of the transcript of the record concerning your representation of Mr. Dawley?

Mr. Holt: No, I don't.

The Court: I would like for you to read it. There are two here. Get a copy from the Clerk.

It appears that you represented Mr. Dawley on the 11th of December and that in this record we concluded the trial of another case and the Court said in there: "You have another matter here today" and you said "I have no other matter."

The Court: You have the matter of the Rule against your partner.

[fol. 17] Mr. Holt: I respectfully differ from the Court. The only persons I was supposed to represent here today I represented, sir." To which the Court responded: "Of course, I am not in the position at all and will not say that Attorney Dawley is represented by you. I know that you represented him when he appeared here once before. Is it your position then that first you asked that the case be set this date? The date of December 11th was given you at your request as counsel for Attorney Dawley as the date that the rule would be heard.

"Now do you continue in your representation, or do you withdraw from your representation?

"Mr. Holt: I am not authorized to represent anybody other than the persons I represent.

"The Court: I take it then that you do not represent him.

"Mr. Holt: That is correct.

"The Court: Now the Court does not wish to be faced with a situation where you have appeared before representing him and then at a future time come back and say you do when you say now that you do not represent him. Are you out of the case?

"Mr. Holt: I am out of the case at this moment, if there is a case.

"The Court: The Court accepts your statement on that—that you are out of the case."

Then, Mr. Holt, you have appeared here again this morning in the case.

Mr. Holt: The Court has posed to me a question. I have checked the record. Would you state the question to me again?

The Court: I don't think the question needs to be stated again. It is just a question that you were in the case on December 11th—I mean October 10th. You had it set for December 11th. On December 11th you said you were not in the case, that you did not represent Mr. Dawley, and I thought that we made it very plain that you were out of it; and this morning you come back and appear in the case after the Court told you that it would not like to be faced with a situation in which you later appeared in the case after having stated you were out, and just your explanation of the situation.

Mr. Holt: All right, sir. We are prepared at this time to give an explanation.

If you will refer to the record, it is indicated that it was asked Mr. Jones to issue a rule and have it served on Mr. Dawley, or in words of substance.

[fol. 18] To the best of my knowledge no such rule was served on Mr. Dawley before the 11th of December.

Mr. Dawley indicated to me that since he had not been served he assumed the matter had been abandoned and that I was not to represent him. If something did occur, when the matter came up, I was not to appear for him.

So based upon this, I think the Court is well aware of a situation that you can be employed by someone in one second and discharged by them in another second.

That is, as I recall it, the situation. I was not in a position to make representation or statements on behalf of anyone other than the client that I had been representing, and I would say that in my opinion had the rule been served on Mr. Dawley prior to the 11th, that it may well have been

that the representation, subsequent hiring and firing would not have occurred.

I think it is also by failure of the rule to be served that that assumption was made that the matter was being dropped (The last part of this sentence was not loud enough to be transcribed.)

The Court: The Court will take this situation under advisement until the other matters are disposed of.

Let the record show that the consideration of it, and disposition of it by the Court, will be postponed until such time as the rule against Mr. Dawley is disposed of.

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Mr. Holt: Your Honor, in the light of the statement just made by the Court, an extensive consultation has to take place again. I don't want to impose upon the Court.

Perhaps if it serves the convenience of the Court, perhaps we can take the lunch break and in light of the statements made—

The Court: Well, maybe there are some other matters that we could take up here. I will give you ample time to consider it, but there are some other matters that we should take up here.

I believe you all have a plea filed here for change of venue?

Mr. Holt: Yes, sir.

The Court: I'm ready to hear you on that.

Mr. Holt: May it please the Court, the defendant, E. A. Dawley, Jr., represents as follows on motion for change of venue:

[fol. 19] The rule to show cause in this issue alleges that the alleged contempt has a background which arose out of a law suit styled Hopewell News, Incorporated, a newspaper, *versus* Curtis Harris and others, and this law suit was tried in the Circuit Court of the City of Hopewell, Virginia, on the 5th and 6th days of October, 1961, at which trial his honor Judge Carlton E. Holladay presided.

The law suit I just referred to, Hopewell News *versus* Curtis Harris, involved the following facts:

The Reverend Curtis Harris and eleven other freedom fighters, by that I mean persons interested in changing the obnoxious pattern of racial segregation and racial discrimination which exists in the Hopewell community, who were alleged members of the Hopewell Improvement Association, an organization dedicated to introducing some measure of democracy and fair-play in the City of Hopewell and active in efforts to eliminate racial discrimination against Negroes in that city.

The additional facts involved in the case were that the Hopewell News is the only newspaper in the City of Hopewell, Virginia, and it has been extremely critical of the efforts and activities of the defendants in the suit of *Hopewell News versus Curtis* and their efforts towards eliminating racial discrimination. And the newspaper, The Hopewell Newspaper, has written many articles condemning the actions and program of the Hopewell Improvement Association.

(C) That on or about September 13, 1960, the Hopewell News brought a suit against the members of the Hopewell Improvement Association for the sum of $45,000 alleging that said members of the Improvement Association have committed libel against it in a leaflet alleged to have been distributed by the members taking issue with the newspaper's point of view.

(D) That had this suit been successful, the obvious and only effect of it would have been to destroy and break the back of the Hopewell Improvement Association and deprive the Negroes in Hopewell of an effective fighting force for their rights, and the further effect of it would have been to unduly enrich the Hopewell News.

(E) That during the course of the litigation of *Hopewell News versus Curtis Harris and others* the Hopewell News continuously printed in its newspaper articles, stories and propaganda concerning the controversy and on at least two [fol. 20] occasions it printed the entire defensive pleadings and counter-claims of the defendants, all for the purpose of securing community-wide support for their side of the con-

troversy and the community-wide disapproval of the members of the Hopewell Improvement Association's side of the controversy.

(F) In addition to this that radio stations also carried extensive coverage of the litigation and the nature of which coverage was to the prejudice of the defendants' side of the controversy. By that I refer to the Hopewell Improvement Association. That the Hopewell News carried extensive coverage of the fact that E. A. Dawley was rendering, had rendered assistance to the members of the Hopewell Improvement Association in defending itself against this said suit by the newspaper and coverage was given to this fact before and after the libel suit terminated; that because the Hopewell Improvement Association and its members successfully resisted destruction and the attempt to burden it with $45,000 judgment, certain reactionary forces in the Hopewell community became and are frustrated in their hopes and desires; that the said Honorable Judge Carlton E. Holladay, who presided in the libel suit and who now fails and refuses to disqualify himself as judge in the contempt trial of the defendant, E. A. Dawley, Jr., has with respect to said contempt action, and is now in effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carlton E. Holladay did intimidate and harass the lawyer representing E. A. Dawley, Leonard W. Holt, Esquire, the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with Leonard Holt's participation in the defense of E. A. Dawley in the contempt action; that part of the harassment and intimidation occurred at the hearing in this matter on January 8, 1962, at which time the Court revealed that it had been making an independent investigation and inquiry of Mr. Holt's conduct and of the contempt offense. The Judge said that he would deal with Leonard Holt after he had dealt with E. A. Dawley.

The defendants in the libel suit had been subpoenaed by the prosecution to testify in the prosecution's behalf against E. A. Dawley, Jr., in the contempt trial; that since these witnesses have been subpoenaed, members of the police department of the City of Hopewell have called upon these witnesses at their homes and places of business on at least two occasions to harass and intimidate them; that the Clerk [fol. 21] of this court, Mr. J. Hamilton Hening, and the Commonwealth's Attorney, Mr. Ligon Jones, who are acting as such in this contempt case, have participated in and have knowledge of the aspect of the events and facts involved in this controversy other than in their official capacity.

The said J. Hamilton Hening, Clerk, has previously testified in the case as a witness on behalf of the prosecution. Ligon Jones has previously participated in a case prior to his becoming counsel of record for the prosecution. Both of the parties have been subpoenaed as witnesses in this case. Both have refused to disqualify themselves. Judge Carlton E. Holladay has refused to disqualify them from participating in this case as Clerk and Commonwealth's Attorney; that the accused, E. A. Dawley, is a member of the Negro race.

MOTION FOR CHANGE OF VENUE

(9) The numerous boycotts, pickets and demonstrations have been carried on in the City of Hopewell, Virginia, and the newspaper and radio stations have alleged that the Hopewell Improvement Association was responsible for the boycott, picketing, and demonstrations and have connected Dawley with the foregoing activities and the foregoing Hopewell Improvement Association, and in the minds of the general public in Hopewell, Virginia, and the general public in Hopewell, Virginia, believe that the Hopewell Improvement Association is responsible for the said activities and that E. A. Dawley, Jr., is connected with said activities and associations; that because of the foregoing facts and circumstances, among others, E. A. Dawley cannot get a fair trial in the City of Hopewell, Virginia; that local prejudice is of such a nature, character and degree that it prevents

a fair and impartial trial from being had in Hopewell, Virginia; that the white people of Hopewell, Virginia, are so greatly aroused against E. A. Dawley that it is probable that he will not obtain a fair trial in the City of Hopewell, Virginia, wherefore, for the foregoing reasons, among others, E. A. Dawley moves that the venue of this trial be changed from the City of Hopewell, Virginia, to some other circuit or corporation court sufficiently remote from the City of Hopewell, Virginia, to secure a fair and impartial trial; and I call the Court's attention to the motion —written motion—which was filed on the 17th day of January, 1962, and there is appended thereto affidavit executed by E. A. Dawley and properly notarized and that copies of this have been delivered to the Commonwealth's Attorney.

Your indulgence, please.

At this time, may it please the Court, we tender to the Clerk of the court, Mr. Hening, the original, and to the Com-
[fol. 22] monwealth's Attorney, Mr. Ligon Jones, a copy of an affidavit in support of the motion just made.

The Court: Do you have a copy of that for the Court?

Mr. Holt: May the Court use the Clerk's copy, please? That is our presentation.

The Court: As I understand it, you have filed a copy of the motion you substantially made in the record in the case here. I believe you read from that?

Mr. Holt: That is correct.

The Court: And it is signed by Mr. Dawley?

Mr. Holt: That is correct, sir.

The Court: Under his affidavit, and you appeared, of course, as representing Mr. Dawley in the matter here today?

Mr. Holt: I don't understand the nature of the question, sir.

The Court: I notice that the pleading was filed apparently in person rather than by you as counsel.

Mr. Holt: Well, it was signed by him. I think we have this situation, and the Court is well aware that he, under the Constitution of the United States, and Virginia, has the right to sign pleadings in his own behalf.

The Court: I was just merely asking—I saw it was signed by him there and not signed by you as counsel, but you appeared here today as counsel.

Is that correct? You have argued the motion. I understood that you appeared as counsel.

Mr. Holt: I think that's what I have done, sir. It's before the Court.

The Court: Before the Court. May I ask a further question here.

You have read, of course, that he cannot get a fair and impartial trial.

Of course, the issue is still pending as to whether or not he will be tried by jury or by the Court. Do you wish to elaborate on that? I'm not asking that you do. I just want to know what you—just if you do—If you want to elaborate on it, I would like to give you an opportunity. If you don't, why it is perfectly all right.

Mr. Holt: I'm not—May I respectfully—You see—Elaborate on it yet—I have some trouble hearing sometimes, sir.

The Court: On the motion for change of venue, does that apply whether your client would be tried before a jury or before the Court? Does it apply in both cases?

Mr. Holt: We say it would apply.

The Court: Apply in both cases.

[fol. 23] At this time I might say that I do not see how that this Court can pass unnoticed the matters and things that have been presented to the Court by Mr. Dawley in a plea filed in the Court and presented here in Court and by Mr. Holt as his counsel and argued in court. I think that the plea is contemptuous, I think the argument is contemptuous.

At this time both E. A. Dawley, Jr., and Leonard W. Holt are held and adjudged summarily to be in contempt of this Court.

I will take under advisement the punishment and advise you of it during the day.

Court will adjourn for lunch.

Mr. Holt: Please, before the Court adjourns, may we get the specificity on the part of the Court regarding what is considered in the pleading, if anything, contemptuous? I

think under the laws of the Commonwealth and United States we are in this position—that if something has been said which is contemptuous, there be elements of intent that should be present, and if the element of intent be present, and there are certain things which flow under it in terms—

The Court: I don't think that you need any specification or bill of particulars on that. I think that you can read it, Mr. Dawley can read it, and I think it is plain to the people who are in the courtroom that the remarks are contemptuous, and you summarily have been held in contempt of Court.

And Court stands adjourned at this time for lunch.

The Court: Next we have action of the Court on a motion for change of venue. Mr. Jones, do you wish to be heard on that?

Mr. Jones: No, your honor. I don't think there's any argument that I would present at this time.

I wholly concur with the Court that that is contemptuous, and I don't propose to answer it at all.

Mr. Holt: May we at this time, my client and I, ask again of the Court—the motion for jury trial—My understanding was that you denied this earlier.

The Court: I have not passed on the motion for jury trial at this time. I think that I would have to pass on the motion for change of venue before I would for a jury trial.

We first have to find out whether we are going to try it in this Court; and then we will determine whether or not it is a jury trial.

Denial of Motion for Change of Venue

If there is nothing further to be heard on the motion for change of venue, the Court is ready to rule on it.

Motion is denied.

[fol. 24] Mr. Holt: May we note an exception, sir.

The Court: Let the record show the exception.

Mr. Holt: May it please the Court, there is one matter which we would like to at this time call to the Court's attention out of an abundance of caution.

I have in my possession a yellow jacket containing certain papers labeled *Dawley versus Law Rule* obtained from the Clerk of the Circuit Court of the City of Hopewell, Mr. J. Hamilton Hening, and I call to the Court's correct attention that in addition to the other papers which are in the packet that there is a paper in there styled United States of America, In the District Court of the United States of the Eastern District of Virginia, Richmond, a suit entitled *E. A. Dawley, Jr.* v. *Carlton E. Holladay, et al.,* Civil Action Number 3414, and the caption to the paper is Amendment to Complaint and that at the end of the document which I have just described there is no notation as to when it was received (The last part of this sentence was not clear enough to transcribe.)

May the record also indicate that in the packet I have just described there is a document entitled In the Supreme Court of the United States, October Term 1961, *E. A. Dawley, Jr., petitioner,* v. *Carlton E. Holladay, respondent,* and the document is entitled Petition for stay of State Court proceedings pending appeal of District Court and Court of Appeals decision and for a temporary restraining order.

May it further indicate in the record that there is not appended at the end any date as to when it was received, but proof of service is attached to said document entitled as I have just described indicates that it was mailed by special delivery on the 28th day of January, 1962, from Norfolk, Virginia, and is properly notarized.

May the record also indicate that in back of the file there are two papers, one of which appears to be a carbon of the other and the title of it is Virginia, In the Circuit Court of the City of Hopewell, Virginia, *Tipton Yerby* v. *Arthur Phillip Clayton Yerby, III,* yet there is not a document on this (The rest of this sentence is not clear enough to transcribe.)

The Court: Now, what do you want the record to indicate —that they are in the file?

Mr. Holt: Yes, sir.

The Court: That they are properly in the file or improperly in the file?

Mr. Holt: I have no intention of being heard at this time.

May we also out of an abundance of caution—

[fol. 25] The Court: For what purpose is the recitation that you made?

Mr. Holt: If I may be permitted, sir, the purpose of the recitation is merely to get into the record the information that was recited.

The Court: May I ask this question? May I see those papers, as to what they are?

It appears that the case of *Yerby against Yerby* has nothing to do with this particular case.

With reference to the paper referred to as Amendment to Complaint, Civil Action 3414, In the United States District Court for the Eastern District of Virginia, that is one of the papers to which you referred?

Mr. Holt: I believe it is, sir.

The Court: Well, now, of course, the caption of this paper shows that it is in the United States District Court of the Eastern District of Virginia, at Richmond.

How did it get in the office of Mr. Hening?

Mr. Holt: I am not in a position to say. I don't know how it got in there.

The Court: You are not in a position to say how that got in Mr. Hening's office?

Mr. Holt: In answer to your question I have no—Your question was how did it get in the file.

The Court: No, how did it arrive in the Clerk's Office of the Circuit Court of the City of Hopewell?

How did it come to be here?

Mr. Holt: I cannot say, sir, how it came to be here at this particular time. I don't know.

The Court: Now, with reference to the paper which you referred to in the Supreme Court of the United States, October Term 1961, E. A. Dawley, Jr., against Carlton E. Holladay. Is that one of the papers that you referred to?

Mr. Holt: I believe so.

The Court: Do you know how that happened to get in the Clerk's Office of the Circuit Court of Hopewell?

Mr. Holt: I do not know how that happened to get into the court file at this time, sir.

The Court: I am talking about how it happened to get filed in the Clerk's Office of the Circuit Court of the City of Hopewell.

Do you know how it got in there?

Mr. Holt: At this point I would have to ask the Court the relativity of the inquiry.

[fol. 26] The Court: I just want to know how it got in there. You brought up the question about it being in the file. I am asking you whether or not you know how these papers got in there.

Mr. Holt: May I suggest to the Court, that since they're in the jacket, and I assume the jacket has been or was primarily in possession of the Clerk, that he be permitted to indicate how they got there, sir.

The Court: The Court is addressing its questions to you, and you have raised the question about these papers being in here.

And the first one, a Civil Action Number 3414, you state that you do not know how it got there.

The other one, the one in the United States Supreme Court, I am asking you at the present time not how it got in the jacket, but how it came to be in the Clerk's Office of the Circuit Court of the City of Hopewell.

Mr. Holt: I would again, if you would permit me, out of an adundance of caution, to merely refer to the relevancy of the matter, and I would like the relevancy explained, to ask that the directive be made to the Clerk, and I respectfully request that of his honor. And I say—Also, I think his honor misunderstood me.

He has used language on at least two occasions that I have raised some question, and I have not raised any question, and if the language that I used tended to suggest that I was raising a question, I now disavow raising any question.

The Court: Well, you called the Court's attention to the fact that these papers were in the file.

You made a recitation as to what papers were in the file, and the Court has asked you just how they came to be in

the Circuit Court of the City of Hopewell, the Clerk's Office of the Circuit Court of the City of Hopewell.

Just how did they come to be there?

Mr. Holt: My previous response still stands. I think, number one, that I would like to know the relevancy of—

The Court: The Court declines to give the relevancy.

You raised the question, and the Court asks you to answer the question.

Mr. Holt: Am I being directed to answer that question now?

The Court: Now, I want to ask that question, and I call your attention to the fact that the paper I am referring *yo* now is signed E. A. Dawley, Jr., by L. Holt counsel.

Are you L. Holt?

Mr. Holt: I am.

The Court: Did you mail that paper to the Clerk's Office?

[fol. 27] Mr. Holt: I believe I did.

The Court: All right. Be seated.

* * * * * * *

Mr. Holt: We would like to ask this of the Court in terms of the other two days. Number one, some matters have arisen today—There is certainly—We would like to request of the Court an opportunity number one, to know specifically what, within the document read, the Court considers contemptuous.

In order that we might do this, it is not our intent to be contemptuous, and we cannot in truth say that subjectively certain things are true, and we rather suspect that subjectively they are not true, but in terms of the objective manifestation it is felt that a fair inference should be drawn from them are the conclusions set forth in the motion for change of venue.

And I think that the Court will attempt to be fair and will once again, allow an opportunity to be made to respond to this.

I think that the Court, for example, right now I can say to the Court on behalf of both Mr. Dawley and myself that if perchance these statements viewed, which are in these documents—viewed objectively tend to be—I don't know

exactly what statements the Court has reference to—But whatever it is, assuming that objectively they tend to lend themselves to such a conclusion, we at this point would disavow any subjective intent, and to that extent would apologize to the Court.

But we feel that if this statement is made, and it has been made, that the intent was not to say that subjectively the conditions therein are absolutely true because of necessity to be able to say this subjectively we would have to know what is going on in the minds of various citizens in Hopewell.

When we don't know subjectively because we were not in their minds and have not been in their minds at the times the various discretions have been made—So we at this point, without knowing what the statements are that are disturbing the Court; we will determine it a general document in terms to any extent that he feels that it is contemptuous of the Court, we say that our intent was not to be contemptuous; and if objectively this result is reached by just looking at them without going into our inward intent, we would say we apologize.

If this is the only conclusion to be drawn, but we say that the statements were made in the best of faith based upon a conclusion drawn from certain objective manifestations.

[fol. 28] Now we may be in error, but I ask the Court to also consider this—That in light of the seriousness—In the light of the seriousness of the contempt charge Mr. Dawley is placed in an awkward position because part of this proceeding involved many factors, and how does one state this?

If the stating of this is improper, we would welcome from the Court a suggestion as to how to restate the idea, so as not to be contemptuous, because this not our intent, and if you will say how this can be stated, the idea of a necessity for a change of venue can be re-stated without offending the citizens of Hopewell, we would be glad to state it.

The only thing we want in the record is that there is reason for a change of venue.

Now, if in our manner of saying it we inadvertently create an impression that we think subjectively the Court or the people or the Commonwealth's Attorney, or whoever else may be referred to there, Hopewell News, we disavow these intentions and we respectfully request of the Court to be allowed the opportunity if it wants us to deal with the specificity. We respectfully request of the Court an opportunity to respond specifically to certain statements and disavow any intent in certain statements to be contemptuous of the Court.

We point out that—That is our position. We respectfully request of the Court that this be done.

The other matter that is separate and apart from this, your honor—Will his honor rule on this request first?

(At this point the recording machine was apparently not in operation for a few moments.)

The Court certifies that the following occurred:

The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr., and his counsel had said that the Court "is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge."

The Court further pointed out that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr., viz., Leonard W. Holt.

The Court further pointed out the allegations in Paragraph (10) of the motion and called attention to the statement in the record that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell.

The Court pointed out the statement made and appearing [fol. 29] in the record that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and before the Court.

The Court then further pointed out the nature of the limited apology.

Whereupon and immediately before the Court fixed their punishment, both defendants tendered a general apology.

The Court then fined both E. A. Dawley, Jr., and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty.

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

JUDGE'S CERTIFICATE

I, Carlton E. Holladay, Judge of the Circuit Court of the City of Hopewell, do hereby certify that the foregoing is a correct and complete transcript of the testimony, facts and incidents of so much of the trial and proceedings against E. A. Dawley, Jr., in the Circuit Court of the City of Hopewell as pertain to and constitute a part of the proceeding wherein E. A. Dawley, Jr., and L. W. Holt were summarily adjudged to be in contempt of court, attached and fined on January 30, 1962.

And I further certify that Nancy W. Raiford was duly sworn as a court reporter and stenographer to faithfully, accurately and completely transcribe the record of said proceedings.

Given under my hand this 9th day of April, 1962.

Carlton E. Holladay, Judge of the Circuit Court of the City of Hopewell.

IN THE CIRCUIT COURT OF THE CITY OF HOPEWELL, VIRGINIA

In Re: E. A. DAWLEY, JR.

In Re: L. W. HOLT

ORDER—April 9, 1962

The above named parties having submitted to the Judge of this court an alleged statement of facts and incidents of trial; and having failed and refused to furnish this court or

the Supreme Court of Appeals the transcript of the evidence [fol. 30] and incidents of trial and procedures wherein said E. A. Dawley, Jr., and L. W. Holt were summarily adjudged to be in contempt of court, attached and fined $50.00 each, as recorded on the Dictaphone installed in and used in the courtroom pursuant to law. And the Court being of opinion that such transcription is necessary in order to certify an accurate statement of the oral testimony and incidents of the trial and procedure; and the Court being of further opinion that in this case the proposed statement of facts and incidents of trial can be amended and enlarged so as to furnish an accurate transcript of the oral testimony, facts and incidents of the trial by the transcription of such record, and that it is necessary and proper so to do; and further that due to the brevity of the record, the Court being able to procure an experienced Dictaphone operator so to do, it is Ordered that the dictabelts in this matter be delivered by the Clerk to Nancy W. Raiford who is hereby directed to faithfully and accurately transcribe so much of the record of the testimony and incidents of the trial and proceedings against E. A. Dawley, Jr., as pertain to E. A. Dawley, Jr., and L. W. Holt being adjudged in contempt of court on the 30th day of January, 1962.

And it is further Ordered that the cost of the transcript be and the same is hereby taxed as cost in this proceeding.

And the Clerk of this court is authorized to deliver a copy thereof to E. A. Dawley, Jr., and L. W. Holt upon their making payment to him of the cost of the transcription of the record in accordance with the stenographer's statement of account.

Entered this 9th day of April, 1962.

Carlton E. Hollaway, Judge.

H. G. Turner, Clerk.

[fol. 99]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 5631

E. A. DAWLEY, JR., Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Hopewell on the 30th day of January, 1962.

MANDATE—June 15, 1964

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

[fol. 100]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 5630

L. W. HOLT, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Hopewell on the 30th day of January, 1962.

MANDATE—June 15, 1964

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

[fol. 101]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 5630

L. W. HOLT,

—v.—

COMMONWEALTH OF VIRGINIA.

Record No. 5631

E. A. DAWLEY, JR.,

—v.—

COMMONWEALTH OF VIRGINIA.

From the Circuit Court of the City of Hopewell, Carlton E. Holladay, Judge.

OPINION BY JUSTICE KENNON C. WHITTLE—
June 15, 1964

Present: Eggleston, C.J., Spratley, Buchanan, Whittle, Snead, I'Anson, JJ.

These cases are before the court upon separate writs of error awarded appellants Holt and Dawley to judgments entered against them in the Circuit Court of Hopewell on the 30th day of January, 1962, wherein they were summarily held to be in contempt of court and fined $50.00 each.

The following material facts are disclosed:

On January 30, 1962, the Circuit Court of the City of Hopewell had before it a contempt citation against Dawley, which grew out of Dawley's conduct in the trial of

a law suit then pending, styled *Hopewell News* v. *Curtis Harris et al.* Dawley was represented in this contempt proceeding by L. W. Holt, his law partner.

[fol. 102] The question before the court at the time involved a motion "for change of venue" which had been signed by Dawley and filed on January 17, 1962. The motion for the change of venue was read to the court and argued by Holt, Dawley's attorney.

It will be noted that the present contempt action against Holt and Dawley arose out of the motion for change of venue filed in the (first) contempt action against Dawley. In this connection the following occurred:

> "The Court: I believe you have a plea filed here for change of venue?
>
> "Mr. Holt: Yes sir.
>
> "The Court: I am ready to hear you on that.
>
> "Mr. Holt: May it please the court, the defendant, E. A. Dawley, Jr., represents as follows on a motion for change of venue * * * ".

Here attorney Holt proceeded to read the long and involved written motion for the change of venue, which motion contained the following:

> " * * * [T]hat the said Honorable Judge Carlton E. Holladay who presided in the libel suit [Hopewell News v. Curtis Harris, et al.] and who now fails and refuses to disqualify himself as judge in the contempt trial of the defendant, E. A. Dawley, Jr. has with respect to said contempt action, and is now in effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carlton E. Holladay did intimidate and harass the lawyer representing E. A. Dawley, Leonard W. Holt, Esquire, the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that

said harassment and intimidation arises out of and is [fol. 103] connected solely with Leonard Holt's participation in the defense of E. A. Dawley in the contempt action; that part of the harassment and intimidation occurred at the hearing in this matter on January 8, 1962, at which time the court revealed that it had been making an independent investigation and inquiry of Mr. Holt's conduct and of the contempt offense. The Judge said that he would deal with Leonard Holt after he had dealt with E. A. Dawley. * * * *"*

After attorney Holt had read the motion for change of venue, embracing the above quoted words, and had argued the same, the following colloquy occurred between the court and counsel:

"The Court: As I understand it, you have filed a copy of the motion you substantially made in the record in the case here. I believe you read from that?

"Mr. Holt: That is correct.

"The Court: And it is signed by Mr. Dawley?

"Mr. Holt: That is correct, sir.

"The Court: Under his affidavit, and you appeared, of course, as representing Mr. Dawley in the matter here today?

"Mr. Holt: I don't understand the nature of the question, sir.

"The Court: I notice that the pleading was filed apparently in person rather than by you as counsel.

"Mr. Holt: Well, it was signed by him. I think we have this situation, and the Court is well aware that he, under the Constitution of the United States, and Virginia, has the right to sign pleadings in his own behalf.

"The Court: I was just merely asking—I saw it was signed by him there and not signed by you as counsel, but you appeared here today as counsel.

"Is that correct? You have argued the motion, I understood that you appeared as counsel.

"Mr. Holt: I think that's what I have done, sir. It's before the Court.

"The Court: Before the Court. May I ask a further question here.

"You have read, of course, that he cannot get a fair and impartial trial.

[fol. 104] "Of course, the issue is still pending as to whether or not he will be tried by jury or by the Court. Do you wish to elaborate on that? I'm not asking that you do. I just want to know what you— • • • . If you want to elaborate on it, I would like to give you an opportunity. If you don't, that is perfectly all right.

"Mr. Holt: I'm not— May I respectfully— You see — Elaborate on it yet— I have some trouble hearing sometimes, sir.

"The Court: On the motion for change of venue, does that apply whether your client would be tried before a jury or before the Court? Does it apply in both cases?

"Mr. Holt: We say it would apply."

• • • • • • •

"[Court] At this time I might say that I do not see how this Court can pass unnoticed the matters and things that have been presented (sic) to the Court by Mr. Dawley in a plea filed in the Court and presented here in Court and by Mr. Holt as his counsel and argued in court. I think that the plea is contemptuous and I think the argument is contemptuous.

"At this time both E. A. Dawley, Jr., and Leonard W. Holt are held and adjudged summarily to be in contempt of this Court.

"I will take under advisement the punishment and advise you of it during the day.

"Court will adjourn for lunch.

"Mr. Holt: Please, before the Court adjourns, may we get the specificity on the part of the Court regarding what is considered in the pleading, if anything, contemptuous? I think under the laws of the Common-

wealth and United States we are in this position—that if something has been said which is contemptuous, there be elements of intent that should be present, and if the element of intent be present, and there are certain things which flow under it in terms—

"The Court: I don't think that you need any specification or bill of particulars on that. I think you can read it, Mr. Dawley can read it, and I think it is plain to the people who are in the courtroom that the remarks are contemptuous, and you summarily have been held in contempt of court."

Following the citation for contempt, the court overruled the motion for the change of venue.

[fol. 105] Thereafter, Mr. Holt undertook to address himself to the question of contempt. In his long and rather incoherent argument, Holt insisted that the court point out the matters contained in the motion which were thought to be contemptuous.

Whereupon the court certified the proceedings which transpired as follows:

"The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr., an[illegible] counsel had said that the Court 'is now in effect a [illegible] or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge'; that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr., viz., Leonard W. Holt; that paragraph (10) of the motion contained the statement that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell; that the record contained accusation that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and trial before the court. The

court then pointed out the nature of the limited apology."

Whereupon the court then fined both E. A. Dawley, Jr. and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty.

While appellants have filed six assignments of error to the action of the trial court, there is only one essential question presented in this case, i.e., whether the motion for change of venue, and argument thereon, pr sented in open court on January 30, 1962, constituted contempt of court, warranting summary judgment. Stated differently, [fol. 106] the question is— Does the trial court possess the power to defend itself against abusive and contemptuous attack by party litigants and their counsel even though the attacks take the form of pleadings filed and argued in the proceeding? Here we must consider:

(1) The power of a court to punish for contempt;

(2) Whether the contemners' actions were contemptuous;

(3) Whether they purged themselves of that contempt, and

(4) Whether summary action was appropriate.

The power of the court to punish for contempt can no longer be challenged. Such power is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from the exercise of all other powers. Without such power the administration of the law would be in continual danger of being thwarted by the lawless. The power to fine and imprison for contempt is incident to every court of record. Such courts *ex necessitate rei* have the power of protecting the administration of justice with a promptitude calculated to meet the exigency of the particular case. The right of punishing contempt by summary conviction is a necessary attribute of judicial power. See *Commonwealth* v. *Dandridge* (1824), 2 Va. Cas.

[fol. 107] (4 Va.) 408; 4 M.J., Contempt, Sec. 5, pages 244-245.

> "That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilmot: 'The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court, stands on the same immemorial usage which supports the whole fabric of the common law; it is as much the *lex terrae*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever.'"

Carter v. *Commonwealth*, 96 Va. 791, 806, 807, 32 S.E. 780; 3 Campbell's Lives of Chief Justices, 153; *United States* v. *Hudson*, 7 Cranch (11 U.S.) 32, 3 L. ed. 259; *Wells* v. *Commonwealth*, 21 Gratt. (62 Va.) 500.

The ingrained principles above recorded had their origin in the genesis of the court itself, having been settled long before the founding of this country. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of the power to protect themselves and the dignity and authority of the court. *Ex parte Robinson* (Ark.), 86 U.S. (19 Wall.) 505, 22 L. ed. 205.

One of the earliest, if not the earliest, United States cases was decided in 1788. This involved a contempt citation against a newspaper, the style of the case being *Respublica* [fol. 108] v. *Oswald*, 1 U.S. (1 Dall.) 319, 1 L. ed. 155, 1 Am. Dec. 246. There, the Chief Justice had this to say:

> "Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the Court. Some doubts were suggested,

whether even a contempt of the Court was punishable by attachments; but, not only my brethren and myself, but, likewise, all the judges of *England*, think, that without this power no Court could possibly exist;—nay, that no *contempt* could, indeed, be committed against us, we should be *so truly contemptible*. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt."

See *Board of Supervisors* v. *Bazile*, 195 Va. 739, 80 S.E. 2d 566, 12 Am. Jur., Contempt § 3, at page 390, 17 C.J.S. § 8, page 16, et seq.

We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?

We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra*, § 11, page 396. He was charged with:

(1) Acting as police officer, chief prosecution witness, ad-[fol. 109] verse witness for the defense, grand jury, chief prosecutor, and judge;

(2) Harassing and intimidating counsel for the accused;

(3) Being unable to conduct a fair and impartial trial.

It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as

amended. That section prescribes the instances in which the court may punish summarily for contempt. It reads in part as follows:

> "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> "(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
>
> * * * * * * *
>
> "(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
>
> "(4) Misbehavior of an officer of the court in his official character."

We thus have the very narrow question of whether the [fol. 110] motion for change of venue, with affidavit attached, together with the argument thereon, constitutes an offense within the meaning of the statute.

Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases annotated on this point in 18 A.L.R. 213; 55 A.L.R. 530; 52 A.L.R. 2d 1297. See also Dangel "Contempt", § 118, at page 58; 12 Am. Jur., Contempt, *supra*, § 13, at pages 397-398.

The statutory authority for change of venue in criminal cases in Virginia is codified as § 19.1-224 of the Code and we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was [fol. 111] addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra,* § 13, page 398; 29 A.L.R. 1273.

We further hold that the contempt was not purged by the supposed disclaimer of intent by these appellants. Nowhere is it pointed out by appellants wherein they attempt to purge themselves of contempt. The record discloses that in addressing the court Holt said this:

> "And I think that the Court will attempt to be fair and will once again allow an opportunity to be made to respond to this.
>
> "I think that the Court, for example, right now I can say to the Court on behalf of both Mr. Dawley and myself that if perchance these statements viewed, which are in these documents—viewed objectively tend to be—I don't know exactly what statements the Court has reference to— But whatever it is, assuming that objectively they tend to lend themselves to such a conclusion, we at this point would disavow any subjective intent, and to that extent would apologize to the Court.
>
> [fol. 112] "But we feel that if this statement is made, and it has been made, that the intent was not to say that subjectively the conditions therein are absolutely

true because of necessity to be able to say this subjectively we would have to know what is going on in the minds of various citizens in Hopewell.

"When we don't know subjectively because we were not in their minds and have not been in their minds at the times the various discretions have been made—So we at this point, without knowing what the statements are that are disturbing the Court, we will determine it a general document in terms to any extent that he feels that it is contemptuous of the Court, we say that our intent was not to be contemptuous; and if objectively this result is reached by just looking at them without going into our inward intent, we would say we apologize. * * * "

These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize.

The general rule is that when contemptuous language is used in a pleading, disclaimer of intentional disrespect will not purge the attorney filing the pleading of contempt. See Dangel "Contempt", § 118, page 58, *supra.* See also *People* v. *Sherwin,* 334 Ill. 609, 166 N.E. 513; 29 A.L.R. 1268; *Redman* v. *State,* 28 Ind. 205; *Mahoney* v. *State,* 33 Ind. App. 655, 72 N.E. 151, 104 Am. St. Rep. 276; 12 Am. Jur., § 73, at page 439.

It is clear to us that no degree of apology or disclaimer of intent could purge these appellants of the shocking attack upon the integrity and honor of the trial court. In this con- [fol. 113] nection we cannot overlook the fact that the trial court had the opportunity to observe the defendants at the time of the so-called apology, and even if words of atonement could wipe out the express and unmistakable slander and personal attack upon the judge, only he was in a position to determine the sincerity of the words of atonement. *Saunders* v. *Commonwealth,* 186 Va. 1000, 1010, 45 S.E. 2d 307; *Board of Supervisors* v. *Bazile, supra,* 195 Va. 739, 745, 80 S.E. 2d 566; *Carter* v. *Commonwealth, supra,* 96

Va. 791, 802, 803, 32 S.E. 780; 17 C.J.S., Contempt, *supra*, § 8, page 21.

Lastly, appellants have sought to inject into this proceeding the suggestion that their constitutional rights are impinged upon by the summary manner in which the trial court called them to task.

Their arguments are devoted to a dissertation on questions which do not exist in this case and, even if present, have long been settled. The conduct for which they are being punished was a direct and open criminal contempt of court and as such was punishable summarily by the court when committed. No constitutional guaranties relating to indictment, rights to counsel, and trial by jury are here involved, and appellants' effort to raise these questions indicates either a lack of knowledge of the established law, [fol. 114] or a novel attempt to avoid the force of the doctrine of *stare decisis* on a point where the law has been settled for hundreds of years.

In *Local 333B, United Marine Division of I.L.A. (A.F.L.)* v. *Commonwealth*, 193 Va. 773, 71 S.E. 2d 159, it is said:

> "(1) Proceedings for contempt of court are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the court and those to preserve and enforce the rights of private parties. The former are criminal and punitive in their nature; the latter are civil, remedial and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are those individuals for the enforcement of whose private rights and remedies the original suit was instituted. *Roanoke Water Works Co.* v. *Roanoke Glass Co.*, 151 Va. 229, 144 S.E. 460; *Deeds* v. *Gilmer*, 162 Va. 157, 261, 174 S.E. 37; *Drake* v. *National Bank of Commerce*, 168 Va. 230, 190 S.E. 302, 109 A.L.R. 1517; *Gloth* v. *Gloth*, 158 Va. 98, 163 S.E. 351; • • • 4 Michie's Jur., Contempt, sec. 3, p. 242; 12 Am. Jur., Contempt, sec. 6, p. 392." *Gompers* v. *Bucks Stove, etc. Co.*, 221 U.S. 418, 441, 31 S. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; *Bessette* v. *Conkey Co.*, 194 U.S. 324, 329, 24 S. Ct. 665, 48 L. ed. 997.

The suggestion that appellants were entitled to a trial by jury is fully answered in the recently decided case (April 6, 1964) of *United States* v. *Barnett*, —— U.S. ——, 84 S. Ct. 984, 12 L. ed. 2d 23. In the majority opinion written by Mr. Justice Clark it is said:

> "Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again. Only five years ago we held a full review of the issue in Green v. United States, 356 U.S. 165 (1958). We held there that '[t]he statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of [fol. 115] court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.' At 183. Nor can it be said with accuracy that these cases were based upon historical error. It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters."

> "And in Eilenbecker v. District Court, 134 U.S. 31 (1890), a contempt was based on the violation of a court order. Mr. Justice Miller said: 'If it has ever been understood that proceedings, according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes —one of the powers necessarily incident to a court of Justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.' At page 36."

See also *In re Debs*, 158 U.S. 564, at pages 594 and 595, 15 S. Ct. 900, 39 L. ed. 1092; *United States* v. *Shipp*, 203 U.S. 563, 27 S. Ct. 165, 51 L. ed. 319.

It is evident that no constitutional rights of these appellants have been violated. Clearly, they were not entitled to trial by jury in this contempt proceeding. And there is nothing of record which shows any deprivation of appellants' right to be tried by an unbiased and impartial judge. The hearing afforded appellants in this instance satisfied all requirements of due process. See *Ungar* v. *Sarafite*, —— U.S. ——, 84 S. Ct. 841, 11 L. ed. 2d 921 (decided March 30, 1964); *Nilva* v. *United States*, 352 U.S. [fol. 116] 385, 77 S. Ct. 431, 1 L. ed. 2d 415; *Tumey* v. *Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. ed. 749, 50 A.L.R. 1243.

For the reasons stated[1] the judgment of the Circuit Court of the City of Hopewell is

Affirmed

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[1] For other cases and texts of interest see:

Sacher v. *United States*, 343 U.S. 1, 72 S. Ct. 451, 96 L. ed. 717.

Cartwright's case, 114 Mass. 230, at page 238.

Gompers v. *Bucks Stove Co.*, 221 U.S. 418, *supra*.

Ex parte Savin, 131 U.S. 267, at 277, 9 S. Ct. 699, 33 L. ed. 150.

Ex parte Terry, 128 U.S. 289, at page 309, 9 S. Ct. 77, 32 L. ed. 405.

4 Blackstone's Com. 286.

Dangel "Contempt" § 445, page 205; § 449, pages 212 and 213 and cases there cited.

[fol. 117]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 5631

E. A. DAWLEY, JR., Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT—June 17, 1964

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment entered herein on June 15, 1964, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution of enforcement of the judgment of this court in the above-styled case entered on June 15, 1964, be, and the same is hereby, stayed, until the 14th day of September, 1964, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

[fol. 118]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 5630

L. W. HOLT, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT—June 17, 1964

Upon consideration of the application of the plaintiff in error praying for a stay of execution of the judgment entered herein on June 15, 1964, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on June 15, 1964, be, and the same is hereby, stayed, until the 14th day of September, 1964, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out of bail.

[fol. 119]

SUPREME COURT OF THE UNITED STATES

No. 464—October Term, 1964

L. W. HOLT, et al., Petitioners,

vs.

VIRGINIA.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR A WRIT OF CERTIORARI

Office-Supreme Court, U.S.
FILED
SEP 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 4641

L. W. HOLT and E. A. DAWLEY, JR.,

Petitioners,

versus

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

L. W. HOLT and E. A. DAWLEY, JR.,

Petitioners,

versus

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners, L. W. Holt and E. A. Dawley, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered on June 15, 1964, affirming the judgment of the Circuit Court of the City of Hopewell, Virginia, entered on January 30, 1962, which summarily convicted them of contempt and fined them $50.00 each.

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia is reported at —— Va. ——, 136 S. E. 2d 809, styled *L. W. Holt* v. *Commonwealth of Virginia* (Record No. 5630), *E. A. Dawley, Jr.* v. *Commonwealth of Virginia* (Record No. 5631). A copy of this opinion is attached in the Appendix hereto.

The judgment of the Circuit Court of the City of Hopewell, which is unreported, appears in the record (R. 9-10)[1] and is also reproduced in the Appendix hereto.

Jurisdiction of This Court

1. The judgment of the Supreme Court of Appeals of Virginia was rendered and entered on June 15, 1964. That court granted a stay of execution on June 17, 1964 pending the timely filing of a petition to this Court for a writ of certiorari.

2. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

Questions Presented for Review

1. Whether a summary conviction for contempt by a state court violates the due process clause of the Fourteenth Amendment where the conviction is based solely upon pertinent allegations made in a motion for change of venue in pending proceedings, and where the contemnors, petitioners herein, are respectively the lawyer who presented and argued the motion and the party on whose behalf the motion was made.

2. Whether a summary contempt conviction violates the due process clause of the Fourteenth Amendment where it clearly is but one episode in a persistent history of harassment to which petitioners, both Negro lawyers, have been subjected in connection with their representation of citizens attempting to enforce constitutionally guaranteed rights in Virginia.

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[1] The symbol "R" refers to the printed Record on Appeal to the Supreme Court of Appeals of Virginia, Record Nos. 5630, 5631, which is part of the record here.

Statute Involved

This petition involves Code of Virginia (1950) as amended, Sec. 18.1-292 which reads in material part as follows:

> "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> "(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
>
> . . . . .
>
> "(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
>
> "(4) Misbehavior of an officer of the court in his official character."

Statement of the Case

Petitioners are both Negro members of the Virginia Bar, and partners in the former law firm of Jordan, Dawley & Holt, Norfolk, Virginia. In October, 1961 Dawley represented the defendants in a libel suit styled *Hopewell News, Inc.* v. *Curtiss Harris et al.* which was tried in the Circuit Court of the City of Hopewell, Virginia, presided over by Judge Carlton E. Holladay (R. 13). Immediately after the suit was dismissed, Judge Holladay asked Dawley a question concerning the unavailability of certain defendants for whose appearance subpoenas had been issued. Dawley

did not then answer the question. Judge Holladay issued a rule to show cause why Dawley should not be held in contempt of court for his refusal to answer the question (R. 13-14). Before the hearing date, Dawley filed a motion requesting Judge Holladay to disqualify himself from the contempt hearing (R. 14). When this motion was denied, Dawley filed a motion for a change of venue for the contempt hearing (R. 14).

The contempt trial came on for hearing before Judge Holladay on January 30, 1962. Holt appeared as counsel for Dawley, who was also present. Judge Holladay indicated he was ready to hear the motion for change of venue. Thereupon Holt read and argued the motion (R. 14, 18-22).

Before ruling on the motion, Judge Holladay summarily held Holt and Dawley in contempt of court, solely because of the contents of the motion and the oral argument by Holt in support thereof (R. 23). The judge certified (R. 28-29) that the following occurred:

> "The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr. and his counsel had said that the Court 'is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.'
>
> "The Court further pointed out that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr., viz., Leonard W. Holt.
>
> "The Court further pointed out the allegations in Paragraph (10) of the motion and called attention to the statement in the record that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell.

"The Court pointed out the statement made and appearing in the record that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and before the Court.

"The Court then further pointed out the nature of the limited apology.

"Whereupon and immediately before the Court fixed their punishment both defendants tendered a general apology.

"The Court then fined both E. A. Dawley, Jr. and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty."

The Supreme Court of Appeals of Virginia, in affirming the conviction, found that petitioners' conduct, as described in the judge's certificate, *supra*, came within the purview of Section 18.1-292 of the Code of Virginia (1950) as amended (App. p. 23).

In view of the summary nature of the contempt conviction, it was impossible for petitioners to raise any federal questions, or to interpose defenses of any kind, before being convicted. Petitioners raised the federal questions in their petition for writ of error to the Supreme Court of Appeals of Virginia, a copy of which was subsequently accepted as their brief in that court.

The opinion of the Supreme Court of Appeals of Virginia explicitly passed upon and rejected the federal constitutional claims raised by petitioners (App. pp. 27-29).

The nature of the case at bar requires a brief mention of certain related circumstances.

The law firm of Jordan, Dawley & Holt, in which petitioners were partners, frequently represented clients at-

tempting to enforce constitutionally guaranteed rights in Virginia and other southern states. The nature of the firm's practice was noted in *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963) in which the United States Court of Appeals for the Fourth Circuit considered an appeal from the dismissal of a complaint filed by the partners in the above-mentioned law firm against state officers under the Civil Rights Acts, 42 U. S. C. Secs. 1981 and 1983. The complaint alleged that the defendants were conspiring to intimidate, discourage and impede the plaintiffs and all Negro citizens of Virginia from using the courts as a means of ending racial discrimination in that state, and that certain Virginia officials had: investigated the friends and clients of plaintiffs; urged and asked their clients to abandon them; raided the offices of plaintiffs and their clients seeking to gather confidential papers and notes; published statements naming plaintiffs as violators of the law.[2]

The incident which precipitated the *Jordan* case occurred on September 17, 1961. 323 F. 2d at 599. Just three weeks later, on October 5 and 6, 1961, petitioner Dawley appeared before Judge Holladay in the Circuit Court of the City of Hopewell as counsel for the defendants in *Hopewell News, Inc.* v. *Curtiss Harris et al.*, in which a local newspaper claimed $45,000.00 damages for libel against several leaders of the Hopewell, Virginia civil rights movement (R. 19-20). It was petitioner Dawley's conduct in the *Hopewell News* case which was at issue in the hearing on January 30, 1962 on the show cause order; it was the conduct of petitioners Dawley and Holt at the January 30, 1962 hearing which resulted in the summary contempt conviction in issue here.

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[2] The surrounding circumstances are described more fully in Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51.

REASONS FOR GRANTING THE WRIT

I.

The conviction of petitioners for contempt, based solely upon the contents of a motion for a change of venue, denied a state court litigant the right guaranteed by the due process clause of the Fourteenth Amendment to be prosecuted in an impartial forum, and denied the litigant's attorney the right to represent his client effectively.

This Court has made it clear that a state court litigant's right to a change of venue in order to be tried in an impartial forum is a right of constitutional dimension guaranteed by the due process clause of the Fourteenth Amendment. *Rideau* v. *Louisiana*, 373 U. S. 723; *Irvin* v. *Dowd*, 366 U. S. 717.[3] The right to move for a change of venue is embodied in the procedures of both the federal and the Virginia courts.[4] A party cannot be punished for filing such a motion, nor can his lawyer be penalized for arguing it.

The lawyer's duty to practice his profession is a necessary corollary to his client's right to the effective assistance of counsel. Interference with performance of the

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[3] *Rideau* and *Irvin* both involved jury trials. Where a motion for change of venue is made in a non-jury trial, it may be considered tantamount to a motion for disqualification of the judge. This characterization, however, should make no difference to the principles involved. The right to have a judge disqualified is recognized in the procedures of both the federal and the Virginia courts. 28 U. S. C. Sec. 144; Code of Virginia (1950) as amended, Sec. 19.1-7. Moreover this Court has given constitutional stature to the right in state proceedings. *Re Murchison*, 349 U. S. 133.

[4] Federal Rules of Criminal Procedure, Rule 21 (a); Code of Virginia (1950) as amended, Sec. 19.1-224; Rules of the Supreme Court of Appeals of Virginia, Rule 1:8.

lawyer's professional duty not only abridges the lawyer's right to practice his profession and his client's right to be assisted effectively by counsel; it impairs the rights of all those who turn to the courts as places of justice. As this Court stated in *Re McConnell*, 370 U. S. 230, 236:

> ". . . (I)t is . . . essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."

The courts must, of course, possess power to punish misconduct which obstructs the administration of justice.[5] But in the case at bar petitioners were clearly not guilty of such misconduct.[6] The language of the motion itself is

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[5] The contempt power of federal courts is provided in 18 U. S. C. Sec. 401; Federal Rules of Criminal Procedure, Rule 42. This contempt power may be exercised summarily only where court-disrupting misconduct occurs in the actual presence of the court, Rule 42 (a); *Re McConnell, supra; Offutt* v. *United States*, 348 U. S. 11, and provided the judge has not become personally embroiled with the contemnor. *Offutt* v. *United States, supra; Cooke* v. *United States*, 267 U. S. 517. The judge must disqualify himself if the alleged contempt involves disrespect to or criticism of himself. Rule 42 (b). Remarks made outside the courtroom about judges, more critical than those involved here, have been held not punishable as contempts. *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331; *Craig* v. *Harney*, 331 U. S. 367; *Re Sawyer*, 360 U. S. 622.

[6] This Court has set standards governing contempt convictions in federal courts. *Re McConnell*, 370 U. S. 230; *Offutt* v. *United States*, 348 U. S. 11; *Cooke* v. *United States*, 267 U. S. 517. The same standards have also been applied in contempt cases from state courts. *Ungar* v. *Sarafite*, 376 U. S. 575; *Re Green*, 369 U. S. 689; *Re Oliver*, 333 U. S. 257. These latter decisions strongly imply a constitutional rule that contempt proceedings in state courts should be governed by the same standards as in federal courts.

Clearly under federal court standards petitioners could not have been summarily convicted of contempt. If a federal judge had found the contents of the motion for a change of venue offensive,

obviously well within the perimeter of decorous pleading. It is substantially similar to Mr. Justice Rutledge's characterization of the Michigan one-man grand jury: "(I)t combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." *Re Oliver*, 333 U. S. 257, 278. By summarily convicting petitioners of contempt, the judge was in effect punishing them for having filed and argued a legitimate motion for a change of venue.

Consequently this Court should grant certiorari in order to reaffirm the constitutional right of a lawyer to argue his client's cause effectively.

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he could have ordered the striking of the offensive portions of the pleading. *Hohensee* v. *Watson*, 188 F. Supp. 941, 943 (DC Pa. 1959), aff'd 283 F. 2d 950 (CA 3, 1960). Or if a federal judge considered contempt proceedings called for, he would be required to disqualify himself under Rule 42 (b) of the Federal Rules of Criminal Procedure, and proceed on notice.

Under Virginia law a judge also has the power to order the striking of offensive pleadings. *Carwile* v. *Richmond Newspapers*, 196 Va. 1, 82 S. E. 2d 588 (1954). A judge also has the obvious power to call counsel into chambers and administer a warning about the umbrage which has been taken.

However, in the case at bar the judge did not take any of these steps. The motion for a change of venue was filed with him well in advance of the hearing (R. 8-9) and we must presume he read it before the hearing commenced. Apparently appreciating that he could not proceed with a summary contempt conviction on the basis of a writing filed with the court, *Cooke* v. *United States*, 267 U. S. 517, the judge invited petitioner Holt, as counsel for the movant (petitioner Dawley), to recite and argue the motion in open court, and thereupon the judge summarily convicted both petitioners of contempt (R. 18-23). This form of judicial entrapment certainly precludes that "atmosphere of austerity which should especially dominate a criminal trial and which is indispensible for an appropriate sense of responsibility on the part of court, counsel and jury." *Offutt* v. *United States*, 348 U. S. 11, 17. *A fortiori*, the movant on whose behalf the motion was argued, and who sat silently through the whole proceeding, can scarcely be guilty of court-disrupting misconduct.

II.

Lawyers who habitually represent citizens attempting to enforce constitutionally guaranteed rights must not, on that account, be subjected to harassment in the form of summary contempt proceedings.

This case presents anew the problem of the lawyer who represents an unpopular cause.[7] Petitioners are both Negro lawyers who habitually represent civil rights litigants. Unfortunately, it is a matter of common knowledge that many communities in Southern States, including Virginia, display a deep-rooted and persistent hostility towards the civil rights movement, and especially against lawyers who express its legitimate ambitions.[8] Civil rights lawyers and their clients find themselves attempting to enforce constitutionally guaranteed rights in a community whose most influential members are often their most bitter adversaries.

In recent years frequent attempts have been made to suppress the activities of civil rights lawyers in Southern communities. The attempts often take the form of regulatory measures which, on their face, may appear salutary and impartial, but which in fact are aimed directly against the proponents of civil rights. In a recent case arising in Vir-

[7] See, e.g., Downs and Goldman, The Obligation of Lawyers to Represent Unpopular Defendants, 9 Howard L. J. 49 (1963); Symposium, The Right to Counsel and the "Unpopular Cause," 20 U. of Pitt. L. Rev. 725 (1959); Cheatham, A Lawyer When Needed (Columbia Univ., 1963); Rostow, The Lawyer and His Client, ABA Journal, January, 1962 and February, 1962.

[8] For expressions of hostility against petitioners herein for their general efforts on behalf of civil rights litigants, see, e.g., Report of the Committee on Offenses Against the Administration of Justice to the Governor and the General Assembly of Virginia (Senate Document No. 16, 1961), pp. 7-8; Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51; *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963).

ginia, this Court pierced the form of a state's purported attempt to regulate, found in substance an attempt to inhibit a constitutionally guaranteed activity, and granted relief to the lawyers and their clients. *N. A. A. C. P.* v. *Button*, 371 U. S. 415. See also *Gibson* v. *Florida Investigation Committee*, 372 U. S. 539; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *City of Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479; *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963). This Court has demonstrated that it will reject all measures, "no matter how sophisticated", which may be employed "in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.*, 366 U. S. 293, 297. See also *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (DC La. 1964), probable jurisdiction noted —— U. S. ——, 12 L. ed. 2d 745.

Unfortunately the judge who summarily adjudged petitioners in contempt in the case at bar displayed that he too was affected by the prejudice which gripped so many other members of the community. The summary contempt proceedings did not occur as an isolated event. Rather, they represent but one more episode in a long history of harassment, indulged in by many state officials and other members of the community as a means of opposing and inhibiting petitioners' activities. In view of the inflamed condition of the community at the time,[9] and with a frank recognition of the problems, the judge should have gladly disqualified himself or granted a change of venue. But he insisted on proceeding summarily. Justice did not "satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14.

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[9] In *Harris* v. *Virginia*, —— U. S. ——, 12 L. ed. 2d 1038 and *Allen* v. *Virginia*, 374 U. S. 93, this Court vacated and remanded unreported Virginia cases, the record of which indicates the conditions prevailing in Hopewell, Virginia.

We have made previous reference to the constitutional right of a lawyer to represent his client. In *Sacher* v. *United States*, 343 U. S. 1, while sustaining a contempt conviction on the facts presented, this Court added, id. at 13-14:

> ". . . this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence."

And in *Re McConnell*, 370 U. S. 230, 236, the Court stated:

> "The argument of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

See also *Re Green*, 369 U. S. 689, *Cammer* v. *United States*, 350 U. S. 399.

Under the prevailing circumstances to which brief reference has been made herein (see, e.g., *Jordan* v. *Hutcheson*, *supra*) the summary contempt conviction must be viewed as punishing petitioners, not only for the events which took place in the courtroom on the occasion of the contempt, but also for being active civil rights lawyers. The conviction consequently operates as a judicially imposed impediment to the constitutionally guaranteed activities of petitioners and of the civil rights litigants they habitually represent.

This Court should grant certiorari so that it may warn judges in signal terms that community prejudices may not be carried to the Bench so as to obstruct the legitimate efforts of civil rights litigants and their lawyers.

CONCLUSION

In view of the considerations set forth above, we respectfully submit that this petition for a writ of certiorari should be granted.

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September, 1964

APPENDIX

Opinion of the Supreme Court of Appeals of Virginia

Present:

EGGLESTON, *C.J.*,
SPRATLEY, BUCHANAN, WHITTLE, SNEAD, I'ANSON, *JJ.*

Record No. 5630

L. W. HOLT,

—v.—

COMMONWEALTH OF VIRGINIA.

Record No. 5631

E. A. DAWLEY, JR.,

—v.—

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE KENNON C. WHITTLE

Richmond, Virginia, June 15, 1964

FROM THE CIRCUIT COURT OF THE CITY OF HOPEWELL
Carlton E. Holladay, Judge

These cases are before the court upon separate writs of error awarded appellants Holt and Dawley to judgments entered against them in the Circuit Court of Hopewell on the 30th day of January, 1962, wherein they were summarily held to be in contempt of court and fined $50.00 each.

The following material facts are disclosed:

On January 30, 1962, the Circuit Court of the City of Hopewell had before it a contempt citation against Dawley, which grew out of Dawley's conduct in the trial of a law suit then pending, styled *Hopewell News* v. *Curtis Harris, et al.* Dawley was represented in this contempt proceeding by L. W. Holt, his law partner.

The question before the court at the time involved a motion "for change of venue" which had been signed by Dawley and filed on January 17, 1962. The motion for the change of venue was read to the court and argued by Holt, Dawley's attorney. "

It will be noted that the present contempt action against Holt and Dawley arose out of the motion for change of venue filed in the (first) contempt action against Dawley. In this connection the following occurred:

> "The Court: I believe you have a plea filed here for change of venue?
>
> "Mr. Holt: Yes sir.
>
> "The Court: I am ready to hear you on that.
>
> "Mr. Holt: May it please the court, the defendant, E. A. Dawley, Jr., represents as follows on a motion for change of venue • • • ".

Here attorney Holt proceeded to read the long and involved written motion for the change of venue, which motion contained the following:

> " • • • [T]hat the said Honorable Judge Carlton E. Holladay who presided in the libel suit [Hopewell News v. Curtis Harris, et al.] and who now fails and refuses to disqualify himself as judge in the contempt trial of the defendant, E. A. Dawley, Jr., has with respect to said contempt action, and is now in effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the de-

fense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carlton E. Holladay did intimidate and harass the lawyer representing E. A. Dawley, Leonard W. Holt, Esquire, the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with Leonard Holt's participation in the defense of E. A. Dawley in the contempt action; that part of the harassment and intimidation occurred at the hearing in this matter on January 8, 1962, at which time the court revealed that it had been making an independent investigation and inquiry of Mr. Holt's conduct and of the contempt offense. The Judge said that he would deal with Leonard Holt after he had dealt with E. A. Dawley. • • • "

After attorney Holt had read the motion for change of venue, embracing the above quoted words, and had argued the same, the following colloquy occurred between the court and counsel:

"The Court: As I understand it, you have filed a copy of the motion you substantially made in the record in the case here. I believe you read from that?

"Mr. Holt: That is correct.

"The Court: And it is signed by Mr. Dawley?

"Mr. Holt: That is correct, sir.

"The Court: Under his affidavit, and you appeared, of course, as representing Mr. Dawley in the matter here today?

"Mr. Holt: I don't understand the nature of the question, sir.

"The Court: I notice that the pleading was filed apparently in person rather than by you as counsel.

"Mr. Holt: Well, it was signed by him. I think we have this situation, and the Court is well aware that he, under the Constitution of the United States, and Virginia, has the right to sign pleadings in his own behalf.

"The Court: I was just merely asking—I saw it was signed by him there and not signed by you as counsel, but you appeared here today as counsel.

"Is that correct? You have argued the motion, I understood that you appeared as counsel.

"Mr. Holt: I think that's what I have done, sir. It's before the Court.

"The Court: Before the Court. May I ask a further question here.

"You have read, of course, that he cannot get a fair and impartial trial.

"Of course, the issue is still pending as to whether or not he will be tried by jury or by the Court. Do you wish to elaborate on that? I'm not asking that you do. I just want to know what you— * * * . If you want to elaborate on it, I would like to give you an opportunity. If you don't, that is perfectly all right.

"Mr. Holt: I'm not— May I respectfully— You see— Elaborate on it yet— I have some trouble hearing sometimes, sir.

"The Court: On the motion for change of venue, does that apply whether your client would be tried before a jury or before the Court? Does it apply in both cases?

"Mr. Holt: We say it would apply."

* * * * *

"[Court] At this time I might say that I do not see how this Court can pass unnoticed the matters and things that have been presented (sic) to the Court by Mr. Dawley in a plea filed in the Court and presented here in Court and by Mr. Holt as his counsel and argued in court. I think that the plea is contemptuous and I think the argument is contemptuous.

"At this time both E. A. Dawley, Jr., and Leonard W. Holt are held and adjudged summarily to be in contempt of this Court.

"I will take under advisement the punishment and advise you of it during the day.

"Court will adjourn for lunch.

"Mr. Holt: Please, before the Court adjourns, may we get the specificity on the part of the Court regarding what is considered in the pleading, if anything, contemptuous? I think under the laws of the Commonwealth and United States we are in this position—that if something has been said which is contemptuous, there be elements of intent that should be present, and if the element of intent be present, and there are certain things which flow under it in terms—

"The Court: I don't think that you need any specification or bill of particulars on that. I think you can read it, Mr. Dawley can read it, and I think it is plain to the people who are in the courtroom that the remarks are contemptuous, and you summarily have been held in contempt of court."

Following the citation for contempt, the court overruled the motion for the change of venue.

Thereafter, Mr. Holt undertook to address himself to the question of contempt. In his long and rather incoherent

argument, Holt insisted that the court point out the matters contained in the motion which were thought to be contemptuous.

Whereupon the court certified the proceedings which transpired as follows:

> "The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr., and his counsel had said that the Court 'is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge'; that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr., viz., Leonard W. Holt; that paragraph (10) of the motion contained the statement that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell; that the record contained accusation that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and trial before the court. The court then pointed out the nature of the limited apology."

Whereupon the court then fined both E. A. Dawley, Jr. and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty.

While appellants have filed six assignments of error to the action of the trial court, there is only one essential question presented in this case, i.e., whether the motion for change of venue, and argument thereon, presented in open court on January 30, 1962, constituted contempt of court, warranting summary judgment. Stated differently, the question is— Does the trial court possess the power to defend itself against abusive and contemptuous attack by party litigants and their counsel even though the attacks

take the form of pleadings filed and argued in the proceeding? Here we must consider:

(1) The power of a court to punish for contempt;

(2) Whether the contemners' actions were contemptuous;

(3) Whether they purged themselves of that contempt, and

(4) Whether summary action was appropriate.

The power of the court to punish for contempt can no longer be challenged. Such power is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from the exercise of all other powers. Without such power the administration of the law would be in continual danger of being thwarted by the lawless. The power to fine and imprison for contempt is incident to every court of record. Such courts *ex necessitate rei* have the power of protecting the administration of justice with a promptitude calculated to meet the exigency of the particular case. The right of punishing contempts by summary conviction is a necessary attribute of judicial power. See *Commonwealth* v. *Dandridge* (1824), 2 Va. Cas. (4 Va.) 408; 4 M. J., Contempt, Sec. 5, pages 244-245.

> "That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilmot: 'The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court, stands on the same immemorial usage which

supports the whole fabric of the common law; it is as much the *lex terrae,* and within the exception of Magna Charta, as the issuing of any other legal process whatsoever.'" *Carter* v. *Commonwealth,* 96 Va. 791, 806, 807, 32 S. E. 780.

3 Campbell's Lives of Chief Justices, 153; *United States* v. *Hudson,* 7 Cranch (11 U. S.) 32, 3 L. ed. 259; *Wells* v. *Commonwealth,* 21 Gratt. (62 Va.) 500.

The ingrained principles above recorded had their origin in the genesis of the court itself, having been settled long before the founding of this country. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of the power to protect themselves and the dignity and authority of the court. *Ex parte Robinson* (Ark.), 86 U. S. (19 Wall.) 505, 22 L. ed. 205.

One of the earliest, if not the earliest, United States cases was decided in 1788. This involved a contempt citation against a newspaper, the style of the case being *Respublica* v. *Oswald,* 1 U. S. (1 Dall.) 319, 1 L. ed. 155, 1 Am. Dec. 246. There, the Chief Justice had this to say:

"Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the Court. Some doubts were suggested, whether even a contempt of the Court was punishable by attachments; but, not only my brethren and myself, but, likewise, all the judges of *England,* think, that without this power no Court could possibly exist;—nay, that no *contempt* could, indeed, be committed against us, we should be *so truly contemptible.* The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt."

See *Board of Supervisors* v. *Bazile,* 195 Va. 739, 80 S. E. 2d 566, 12 Am. Jur., Contempt §3, at page 390, 17 C. J. S. §8, page 16, *et seq.*

We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?

We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra,* §11, page 396. He was charged with:

(1) Acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge;

(2) Harassing and intimidating counsel for the accused;

(3) Being unable to conduct a fair and impartial trial.

It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as amended. That section prescribes the instances in which the court may punish summarily for contempt. It reads in part as follows:

"The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

* * * * * *

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character."

We thus have the very narrow question of whether the motion for change of venue, with affidavit attached, together with the argument thereon, constitutes an offense within the meaning of the statute.

Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases annotated on this point in 18 A. L. R. 213; 55 A. L. R. 530; 52 A. L. R. 2d 1297. See also Dangel, "Contempt", §118, at page 58; 12 Am. Jur., Contempt, *supra*, §13, at pages 397-398.

The statutory authority for change of venue in criminal cases in Virginia is codified as §19.1-224 of the Code and

we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra*, §13, page 398; 29 A. L. R. 1273.

We further hold that the contempt was not purged by the supposed disclaimer of intent by these appellants. Nowhere is it pointed out by appellants wherein they attempt to purge themselves of contempt. The record discloses that in addressing the court Holt said this:

> "And I think that the Court will attempt to be fair and will once again allow an opportunity to be made to respond to this.
>
> "I think that the Court, for example, right now I can say to the Court on behalf of both Mr. Dawley and myself that if perchance these statements viewed, which are in these documents—viewed objectively tend to be —I don't know exactly what statements the Court has reference to— But whatever it is, assuming that objectively they tend to lend themselves to such a conclusion, we at this point would disavow any subjective intent, and to that extent would apologize to the Court.
>
> "But we feel that if this statement is made, and it has been made, that the intent was not to say that sub-

jectively the conditions therein are absolutely true because of necessity to be able to say this subjectively we would have to know what is going on in the minds of various citizens in Hopewell.

"When we don't know subjectively because we were not in their minds and have not been in their minds at the times the various discretions have been made— So we at this point, without knowing what the statements are that are disturbing the Court, we will determine it a general document in terms to any extent that he feels that it is contemptuous of the Court, we say that our intent was not to be contemptuous; and if objectively this result is reached by just looking at them without going into our inward intent, we would say we apologize. * * * "

These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize.

The general rule is that when contemptuous language is used in a pleading, disclaimer of intentional disrespect will not purge the attorney filing the pleading of contempt. See Dangel, "Contempt", §118, page 58, *supra*. See also *People* v. *Sherwin*, 334 Ill. 609, 166 N. E. 513; 29 A. L. R. 1268; *Redman* v. *State*, 28 Ind. 205; *Mahoney* v. *State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276; 12 Am. Jur., §73, at page 439.

It is clear to us that the pretended apology or disclaimer of intent did not purge these appellants of the shocking attack upon the integrity and honor of the trial court. In this connection we cannot overlook the fact that the trial court had the opportunity to observe the defendants at the time of the so-called apology, and even if words of atonement could wipe out the express and unmistakable slander and personal attack upon the judge, only he was in a posi-

tion to determine the sincerity of the words of atonement. *Saunders* v. *Commonwealth*, 186 Va. 1000, 1010, 45 S. E. 2d 307; *Board of Supervisors* v. *Bazile, supra*, 195 Va. 739, 745, 80 S. E. 2d 566; *Carter* v. *Commonwealth, supra*, 96 Va. 791, 802, 803, 32 S. E. 780; 17 C. J. S., Contempt, *supra*, §8, page 21.

Lastly, appellants have sought to inject into this proceeding the suggestion that their constitutional rights are impinged upon by the summary manner in which the trial court called them to task.

Their arguments are devoted to a dissertation on questions which do not exist in this case and, even if present, have long been settled. The conduct for which they are being punished was a direct and open criminal contempt of court and as such was punishable summarily by the court when committed. No constitutional guaranties relating to indictment, rights to counsel, and trial by jury are here involved, and appellants' effort to raise these questions indicates either a lack of knowledge of the established law, or a novel attempt to avoid the force of the doctrine of *stare decisis* on a point where the law has been settled for hundreds of years.

In *Local 333B, United Marine Division of I. L. A. (A. F. L.)* v. *Commonwealth*, 193 Va. 773, 71 S. E. 2d 159, it is said:

> "(1) Proceedings for contempt of court are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the court and those to preserve and enforce the rights of private parties. The former are criminal and punitive in their nature; the latter are civil, remedial and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are those individuals for the enforcement of whose private rights and remedies the original suit was instituted. *Roanoke Water Works Co.* v. *Roanoke*

Glass Co., 151 Va. 229, 144 S. E. 460; *Deeds* v. *Gilmer*, 162 Va. 157, 261, 174 S. E. 37; *Drake* v. *National Bank of Commerce*, 168 Va. 230, 190 S. E. 302, 109 A. L. R. 1517; *Gloth* v. *Gloth*, 158 Va. 98, 163 S. E. 351; * * * 4 Michie's Jur., Contempt, sec. 3, p. 242; 12 Am. Jur., Contempt, sec. 6, p. 392." *Gompers* v. *Bucks Stove, etc. Co.*, 221 U. S. 418, 441, 31 S. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874; *Bessette* v. *Conkey Co.*, 194 U. S. 324, 329, 24 S. Ct. 665, 48 L. ed. 997.

The suggestion that appellants were entitled to a trial by jury is fully answered in the recently decided case (April 6, 1964) of *United States* v. *Barnett*, —— U. S. ——, 84 S. Ct. 984, 12 L. ed. 2d 23. In the majority opinion written by Mr. Justice Clark it is said:

"Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again. Only five years ago we held a full review of the issue in Green v. United States, 356 U. S. 165 (1958). We held there that '[t]he statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.' At 183. Nor can it be said with accuracy that these cases were based upon historical error. It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters."

"And in Eilenbecker v. District Court, 134 U. S. 31 (1890), a contempt was based on the violation of a court order. Mr. Justice Miller said: 'If it has ever been understood that proceedings, according to the com-

mon law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes —one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.' At page 36."

See also *In re Debs*, 158 U. S. 564, at pages 594 and 595, 15 S. Ct. 900, 39 L. ed. 1092; *United States* v. *Shipp*, 203 U. S. 563, 27 S. Ct. 165, 51 L. ed. 319.

It is evident that no constitutional rights of these appellants have been violated. Clearly, they were not entitled to trial by jury in this contempt proceeding. And there is nothing of record which shows any deprivation of appellants' right to be tried by an unbiased and impartial judge. The hearing afforded appellants in this instance satisfied all requirements of due process. See *Ungar* v. *Sarafite*, 376 U. S. 575, 84 S. Ct. 841, 11 L. ed. 2d 921 (decided March 30, 1964); *Nilva* v. *United States*, 352 U. S. 385, 77 S. Ct. 431, 1 L. ed. 2d 415; *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749, 50 A. L. R. 1243.

For the reasons stated[1] the judgment of the Circuit Court of the City of Hopewell is *Affirmed*.

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[1] For other cases and texts of interest see:

Sacher v. *United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. ed. 717.

Cartwright's case, 114 Mass. 230, at page 238.

Gompers v. *Bucks Stove Co.*, 221 U. S. 418, *supra*.

Ex parte Savin, 131 U. S. 267, at 277, 9 S. Ct. 699, 33 L. ed. 150.

Ex parte Terry, 128 U. S. 289, at page 309, 9 S. Ct. 77, 32 L. ed. 405.

4 Blackstone's Com. 286.

Dangel, "Contempt" §445, page 205; §449, pages 212 and 213 and cases there cited.

Judgment of the Circuit Court of the City of Hopewell, Virginia (R. 9-10)

Circuit Court of the City of Hopewell, on Tuesday, the 30th day of January, in the year of our Lord, nineteen hundred and sixty-two. In *Re*: E. A. Dawley, Jr., and L. W. Holt, Attorneys—Contempt.

It appearing to the court that in the hearing in the premises of the rule against the defendant, E. A. Dawley, Jr. for contempt, this day heard, that the said E. A. Dawley, Jr. and L. W. Holt, both practicing attorneys before this court, did in writing, representation and action commit a contempt against this court, and in this court, and before the bar of this court, as duly disclosed by the record in that said case which has been duly taken down and recorded, are accordingly found to be, and held, in contempt of this court, and each is fined the sum of Fifty Dollars, summarily, by the court for such contempt, and to the action of the court in finding and holding the said E. A. Dawley, Jr. and L. W. Holt, guilty of said contempt, they each excepted.

On motion of the said defendants for a suspension of the execution of the said fine herein imposed against them for contempt, in order that they may each appeal to the Supreme Court of Appeals of Virginia, the court doth suspend execution of said fine for a period of sixty days for this purpose upon the said defendants executing a good and sufficient bond in the penalty of Two Hundred Fifty Dollars, with surety to be approved by the Clerk of this court, and conditioned and payable according to law.

Said bond in each case having been this day duly executed, execution of said fine is hereby suspended in each case for a period of sixty days to permit application for, or perfection of, said appeal.

Thereupon each of the said parties were released from custody upon his respective bond as hereinabove recited, and upon the conditions aforesaid.

(Signed) CARLTON E. HOLLADAY

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Supreme Court of the United States

October Term, 1964

No. 464

L. W. HOLT AND E. A. DAWLEY, JR.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1964

No. .....

L. W. HOLT AND E. A. DAWLEY, JR.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The conviction of petitioners (hereinafter sometimes referred to as defendants) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the cases of *L. W. Holt* v. *Commonwealth of Virginia,* Record No. 5630, and *E. A. Dawley, Jr.* v. *Commonwealth of Virginia,* 205 Va....., 136 S. E. (2d) 809. The two cases were heard together. The judgment of the Court was entered on June 15, 1964.

CONSTITUTIONAL PROVISIONS ALLEGEDLY VIOLATED

1. The Fourteenth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is said to be invoked under 20 U.S.C., Section 1257.

STATEMENT OF THE CASE

It is well for this Court to bear in mind just what this case really is and not be misled by the distortion of the evidence made by counsel for petitioners. Counsel would have you believe that these petitioners were punished for contempt because they are members of the bar who represent so-called civil rights litigants. This is not correct. They were punished because they were in contempt of court for the reason they insulted the presiding judge of the Third Judicial Circuit of Virginia, in open court. The power to punish by contempt should be spelled out clearly by statute and not left to conjecture. The Virginia statute, Code Section 18.1-292, Code of Virginia* is clear and distinct.

E. A. Dawley, Jr. was counsel for the defendants in the case of *Hopewell News, Incorporated* v. *Curtis Harris, et al.* This case was set for trial in the Circuit Court of the City of Hopewell on October 5, 1961. Subpoenas were issued for the appearance of the twelve defendants. The City Sergeant

*"The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

"(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Section 18.1-292 Code of Virginia 1950, as amended.

reported to the Court on October 5 that defendants could not be found. The Court directed that other additional subpoenas be issued, returnable on October 6. This direction was done in the presence of E. A. Dawley, Jr. On October 6 the Sergeant again reported that the defendants could not be found.

On that day, an agreement was reached between the parties, and while the dismissal order was being prepared, Curtis W. Harris, one of the defendants who had been twice summoned was seen in consultation with E. A. Dawley in the court room. After the final order was entered dismissing the said suit as "Dismissed Agreed," Judge Holladay had the clerk of the court and counsel, including Dawley, appear before him in chambers. There the Judge "asked Dawley whether he, Dawley, had anything to do with the said witnesses [those having been summoned on two occasions] being unavailable to be served with subpoenas" (R. 13). The question was propounded three times to Dawley. He failed and refused to answer. He requested time to consider same. Thereupon, the court directed him to appear on October 10, 1961, at ten o'clock. On that day, he was again given an opportunity to give his answer to the said question, which he failed to do. The matter was continued until December 11th. On that date (December 11) Holt stated to the court that he did not represent Dawley. "I am out of the case at this moment, if there is a case" (R. 17). The Judge then directed the Commonwealth's Attorney to prepare a show cause order against Dawley, which rule was made returnable January 8, 1962, to show why he (Dawley) should not be held in contempt. Dawley moved that the Commonwealth file a bill of particulars, which motion was granted. The bill of particulars is found on R. 7 and 8 of the record. On January 8 the hearing on the rule was continued until January 30, 1962. Motion for change of venue was

filed on January 17, 1962. Pertinent parts thereof are found on R. 8 and R. 9.

As the alleged contempt of Dawley resulted from action committed *in the presence of the court* on October 6, 1961, the contempt was punishable summarily under Section 18.1-292, *supra*. Surely, the Judge could not ignore such conduct. The court's question to Dawley was entirely proper. Here we had a situation where for some unknown reason the twelve clients of Dawley could not be found by the City Sergeant to be served with subpoenas. The case had been postponed on October 5th for this reason. The same thing occurred for a second time when the sergeant sought to serve the subpoenas. Dawley was present on October 5th and heard Judge Holladay direct the sergeant to again attempt to serve the subpoenas. How Harris happened to be with Dawley during the time the dismissal order was being prepared is not known. The question asked of Dawley by the Judge was a very simple one, "whether he, Dawley, had anything to do with the witnesses being unavailable," which called for a direct and prompt answer from a lawyer as an officer of the court whose duty it was to be fair to the court in such matters. Instead of giving the court an answer then and there, Dawley failed to answer the question. Judge Holladay, at Dawley's request, gave him time to consider his answer and set the matter down for October 10, as stated above. The matter was continued again and again so as to give Dawley ample time to answer the question or show the Court why he should not be compelled to answer. Whether Judge Holladay was in error in overruling the motion made by Dawley (on December 20, 1961) to disqualify himself is a matter which could have been decided by the Supreme Court of Appeals of Virginia, but as the first contempt case was never concluded, that question was never determined and same Is Not Before This Honorable Court. Nor

is the propriety of the Judge's ruling on the motion for a change of venue before this Court.

The complete stenographic record of the hearing on January 30, 1962, at which time the contempt was committed, is found on R. 16 to R. 29, inclusive. Nothing of any consequence transpired before argument was made by Holt on the *motion for a change of venue* (R. 18). The argument largely consisted of reading the motion to the Court (R. 20, 21). In the course of the argument, the following was stated:

> "... The said Honorable Judge Carleton E. Holladay . . . is now is effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carleton E. Holladay did intimidate and harass the lawyer representing E. H. Dawley, Leonard W. Holt, Esq."

The written motion for change of venue which was signed by E. A. Dawley, Jr. contained this statement:

> "The said Judge Carleton E. Holladay . . . has with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecuting witness, adverse witness for the defense, grand jury, chief prosecutor and judge.
>
> "That in addition to the foregoing, said Judge Carleton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq." (R. 8, 9).

At the conclusion of the argument made by Holt, the Court announced "that the plea is contemptuous, I think the argument is contemptuous." At that time, both E. A.

Dawley, Jr. and Leonard W. Holt were summarily adjudged to be in contempt of court.

Before fixing the punishment, the Court overruled the motion for a change of venue [in the first contempt case] (R. 23), after which a dialogue between L. W. Holt and the Court ensued in which the defendants registered a supposed disclaimer of intent, which was characterized by the Supreme Court of Appeals of Virginia as follows:

> "These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize."

At the conclusion of this colloquy, the Court fined each of the defendants $50.00. It is from this judgment that an appeal was taken to the Supreme Court of Appeals of Virginia, and is now before this Court.

On pages 5 and 6 of their brief, counsel for the petitioners go outside the record in their struggle to vindicate the conduct of these petitioners. They tell the Court that the law firm of which the petitioners were partners was embroiled in litigation with the Virginia Legislative Committee on Offenses Against the Administration of Justice before the Federal Court for the Eastern District of Virginia (209 F. Supp. 131) during the fall of 1961. Of course, they failed to connect Judge Holladay with that case because the Judge had nothing at all to do with the same. The incident which precipitated the *Jordan* case (*Jordan* v. *Hutchinson*, 323 F. (2d) 597) occurred in the City of Norfolk, far removed from the City of Hopewell. The bald and unwarranted statement of counsel that the pendency of said case was a related circumstance to the case at bar is not supported by the facts and apparently is a deliberate attempt to prejudice this Court against the Commonwealth of Virginia in *this case*

If counsel's argument is sound then it would mean that the mere existence of said litigation in the Federal Court by the law firm with which the petitioners were partners would be a license for the petitioners to insult any judge in any State Court throughout Virginia, because all judges throughout Virginia would be charged with the knowledge of such pending case and would thereby be "affected by the prejudice which gripped so many other members of the community." Such an argument is too far fetched to receive serious consideration.

To repeat, there is nothing in this record to indicate to the slightest degree that Judge Holladay was affected by the alleged community prejudice.

ARGUMENT

I.

Petitioners Were Not Denied Due Process of Law.

Petitioners argue, on pages 7 and 8 of their brief, that their conviction for contempt based upon the contents of a motion for a change of venue denied one of them as a litigant in the State Court the right guaranteed by the due process clause of the Fourteenth Amendment to be prosecuted in an impartial forum and denied the other as the litigant's attorney the right to represent his client effectively.

We agree with the statement made by counsel on page 7 "that a party cannot be punished for filing such a motion (motion for a change of venue) nor can his lawyer be penalized for arguing it." Petitioners were not punished for filing and arguing a motion for the change of venue. They were punished for filing a motion for a change of venue containing abusive, contemptuous and contemptible language concerning the trial judge and while arguing the motion in open court and using the same abusive language.

Whether there were grounds for a change of venue or for the disqualification of the judge are not issues in this case. As heretofore pointed out, these issues were not presented to the State appellate court for determination as the first contempt case was never brought to a conclusion and neither are these issues presented here. The only question presented here is: "Whether these petitioners were guilty of contempt of court." Petitioners were not denied due process of law. On the contrary, they were afforded all the rights and remedies by the courts of Virginia in determining said issue. By the Virginia statute (19.1-282 of the Code) they were granted a writ of error to the Supreme Court of Appeals to have the action of Judge Holladay in adjudging them in contempt reviewed.

There is no provision in the statute, to-wit, Virginia Code Section 18.1-292, or in any other statute that provides for disqualification of a judge in a contempt proceeding where the acts of contempt are committed in the presence of the judge. If Section 19.1-7* does apply in cases of contempt (and we doubt that it does because the question has never been determined by the Virginia courts) the Judge himself must determine whether it is proper that he should preside. His act, of course, would be reviewed by the Supreme Court of Appeals and the question there would be whether he abused his discretion in not disqualifying himself.

Is there any evidence disclosed in the record to show that Judge Holladay abused his discretion in not disqualifying himself after he held the pleading and argument filed and

*"When the judge of a circuit or corporation court in which a prosecution is pending is connected with the accused or party injured, or is so situated in respect to the case as in his opinion to render it improper that he should preside at the trial, he shall enter the fact of record and the clerk of the court shall at once certify this fact to the Chief Justice of the Supreme Court of Appeals and thereupon another judge shall be appointed, in the manner prescribed by §17-7, to preside at the trial."

made by the petitioners were contemptuous and before fixing the punishment? If there is such evidence, we are unable to find it, and furthermore we do not believe that it can be found.*

Counsel would have this Court believe that Judge Holladay's action interfered with Holt's professional duty to effectively represent his client Dawley. This is not correct. The only thing appearing in the record concerning the argument on the motion (exclusive of the motion itself) is this:

"The Court:

* * *

"I believe you all have a plea filed here for change of venue?

"Mr. Holt:
"Yes, sir.

"The Court:
"I'm ready to hear you on that.

*The Supreme Court of Appeals of Virginia, in answering the argument presented by petitioners for a change in venue and for the disqualification of the Judge, had this to say (205 Va. 339):

"The statutory authority for change of venue in criminal cases in Virginia is codified as §19.1-224 of the Code and we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

"Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra*, §13, page 398; 29 A.L.R. 1273."

"Mr. Holt:

"May it please the Court, the defendant, E. A. Dawley, Jr., represents as follows on motion for change of venue:

(Then follows the argument):

"The Court: Next we have action of the Court on a motion for change of venue. Mr. Jones, do you wish to be heard on that?

"Mr. Jones: No, your honor. I don't think there's any argument that I would present at this time.

"I wholly concur with the Court that that is contemptuous, and I don't propose to answer it at all.

"Mr. Holt: May we at this time, my client and I, ask again of the Court—the motion for jury trial—My understanding was that you denied this earlier.

"The Court: I have not passed on the motion for jury trial at this time. I think that I would have to pass on the motion for change of venue before I would for a jury trial.

"We first have to find out whether we are going to try it in this Court, and then we will determine whether or not it is a jury trial.

"If there is nothing further to be heard on the motion for change of venue, the Court is ready to rule on it.

"Motion is denied.

"Mr. Holt: May we note an exception, sir.

"The Court: Let the record show the exception."

To substantiate his argument, counsel cites the case of *Re McConnell*, 370 U. S. 230, 236, quoting certain dictum therefrom. The situation in the *McConnell* case was entirely different from the case at bar. There, the trial court had instructed attorneys to refrain from asking questions on subjects which the court had ruled not admissible. McConnell felt that the trial court was in error in this particular

(which in fact it was) and he felt that he must ask the questions in order to make up the record for an appeal (if necessary). He stated to the court that he was going to ask the questions until stopped by some bailiff. Thereupon, the court recessed. After the resumption of the trial, McConnell did not ask the questions. This Court reversed, thereby construing 18 U.S.C.A., Section 401,* to apply the cases where the misbehavior of the alleged contemptor amounts to an actual obstruction of the administration of justice. Mr. Justice Harlan pointed out in a dissenting opinion, joined by Mr. Justice Stewart, that he did not believe that the Court intended in its opinion to mean that only a physical obstruction appending judicial proceedings is punishable under the said federal statute, citing many cases decided by this Court to the effect that "the Court's power to punish summarily for contempt has always been available as a sanction against the use of abusive and insulting language" (82 S. Ct. 1293).

Be that as it may, the Court in this case is not called upon to apply the provisions of the federal statute. Here the Court must apply the Virginia statute (Section 18.1-292, Code of Virginia (1950)), which statute is broader than the act of Congress and vests the courts of Virginia with the specific power to punish summarily for contempt as a sanction against the use of abusive and insulting language. The Supreme Court of Appeals of Virginia, in passing upon the question of whether or not the conduct of the petitioner amounted to contempt within the meaning of the Virginia statute, stated (205 Va. 338):

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*"§401. *Power of court*

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

"We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?

"We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra,* §11, page 396. He was charged with:

"(1) Acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge;

"(2) Harassing and intimidating counsel for the accused;

"(3) Being unable to conduct a fair and impartial trial.

"It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as amended."

The decision on the Virginia statute made by the Virginia Supreme Court of Appeals should be followed by this Honorable Court. *Leavenworth County* v. *Barnes,* 94 U. S 70.

Counsel seeks to equate the case at bar with the case of *In re Oliver,* 333 U. S. 257. Similarity between the two cases is totally lacking. Oliver appeared before a circuit court

judge who was conducting in accordance with Michigan law a "one man grand jury investigation." The hearing was conducted in the Judge's chambers from which the public was excluded. During the course of the secret session after hearing evidence from another witness and from Oliver, the Judge, believing that Oliver was not telling the truth, summarily held him in contempt. No opportunity was afforded Oliver to offer an explanation or a defense. This Court released Oliver in a habeas corpus proceeding, holding that the commitment constituted a denial of due process on the ground (1) of the secrecy of the proceeding and (2) of lack of reasonable opportunity to be heard on the contempt charge. The case at bar differs from *Oliver* in two respects. First, petitioners were adjudged in contempt in open court and, secondly, no explanation could disprove the fact that petitioners had committed such contempt of the court's authority and dignity which deserved instant punishment, thus coming within the second exception to the holding of Mr. Justice Goldberg that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, expressed in his dissenting opinion in the case of *Ungar* v. *Sarafite,* 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. (2d) 921.*

In that case, the Court, in affirming a judgment of the Supreme Court of New York, held that the remarks of a wit-

*"I would hold, therefore, that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, except when (1) the contempt creates such 'an open threat to the orderly procedure of the court. * * [that if] not instantly suppressed and punished, demoralization of the court's authority will follow.' *In re Oliver, supra,* at 275 of 333 U.S., at 508 of 68 S. Ct. 92., 92 L. Ed. 682, quoting *Cooke* v. *United States,* 267 U.S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767, and when (2) 'no explanation could mitigate [contemner's] offense, or disprove the fact that he had committed such contempt of [the court's] authority and dignity as deserved instant punishment.' Ex parte Terry, 128 U.S. 289, 310, 9 S. Ct. 77, 81, 32 L. Ed. 405." (84 S. Ct. 857).

ness that he was being badgered and coerced and that the Court was suppressing evidence, did not constitute such a personal attack on the Judge as to require his disqualification. We submit that applying the standards governing contempt convictions which this Court has applied in federal cases, there is nothing in this record which indicates that Judge Hollaway should have disqualified himself as the action taken by him in holding petitioners in contempt was necessary to maintain the authority and dignity of the Court over which he presided.

Counsel in the petition on page 8 makes this statement:

> "The language of the motion itself is obviously well within the perimeter of the decorous pleading."

We do not agree with the learned counsel. If it is customary for attorneys to use such language in pleadings in the jurisdictions in which said counsel habitually practice, it is of no concern to us, but such a practice is simply not tolerated in Virginia where the members of the Bar take pride in maintaining the respect of the courts.

The Supreme Court of Appeals of Virginia had this to say in reference to the duty of attorneys in respect to their relationship with the Court:

> "Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases an-

notated on this point in 18 A.L.R. 213, 55 A.L.R. 530; 52 A.L.R. 2d 1297. See also Dangel, 'Contempt,' §118, at page 58; 12 Am. Jur., Contempt, *supra,* §13, at pages 397-398." (205 Va. 339).

II.

Petitioners Were Not Subject to Harrassment in This Contempt Proceeding on Account of Being "Civil Right Lawyers"

We do not understand the petitioners' argument made in this connection. Counsel representing unpopular causes have no greater privileges to practice than counsel in other cases. The adjudication that petitioners were in contempt did not arise in a case while the petitioners were representing "civil rights litigants," whatever that term may mean. Certainly, the mere fact that petitioners as attorneys had represented civil rights litigants in the past gave them no license to use abusive language towards the Judge in pleadings filed and in arguments made. The written motion for a change of venue was filed on January 17, 1962, some nine days after the last contact the petitioners had with the Judge at the hearing on January 8, 1962. The argument on said motion was made on January 3, 1962, some twenty-two days after said hearing on January 28, 1962. Hence, it is obvious that the petitioners' conduct in this respect amount to a deliberate attack on the integrity of the court and designed for no other reason than to bring the court in disrepute. It is the duty of an attorney to refrain from abusive language and maintain a respectful bearing toward the court. Dangel, Contempt, Section 118. Regardless of how the petitioners may have felt towards the Judge and regardless of how they may have believed that there was a hostile feeling towards them in the community, this constituted no reason to launch a personal attack on the integrity and honesty of the Judge. Certainly, the mere fact that they had represented civil rights litigants in the past gave them no license to do this.

In *Ex Parte Terry,* 128 U. S. 289, 32 L. Ed. 405, 410, in refusing to grant relief in a habeas corpus proceeding to the applicant who was imprisoned as a result of being held in contempt of court, the Court stated:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney,* 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice."
>
> * * *
>
> "We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded 'to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution.' We have seen that it is *a settled doctrine* in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed *in the face of the court,* at least one of superior jurisdic-

tion, *the offender may,* in its discretion, be instantly apprehended and *immediately imprisoned,* without trial or issue, and without other proof than its *actual knowledge of what occurred;* and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence." (128 U. S. 412.) (Italics supplied.)

In *Fisher* v. *Pace,* 336 U. S. 155, 159, 93 L. Ed. 569, 573:

"Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."

* * *

"The judgment of the Supreme Court of Texas must be affirmed. In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of

> misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

It is abundantly clear that this Honorable Court has long recognized that courts may punish for contempt when the contempt is committed in the actual presence of the court and that public policy demands that reliance and confidence must be placed in the presiding judge, be that judge a Federal judge or a State judge. In either category, the judge represents the majesty of the law upon which orderly society rests. His actions in this particular should not be impeded except for compelling reasons. No such reasons appear in the case at bar.

On page 11 of the petition there is stated:

> "The Judge should have gladly disqualified himself or granted a change in venue. But he insisted on proceeding summarily."

This statement is confusing as it is apparently in reference to the *first* contempt case which was never concluded. In that case, the Judge did not proceed summarily. Full opportunity was given Dawley to file pleadings in the case and argue the motion for change of venue. It was a result of the filing of the motion and the argument thereon that resulted in the action of the Judge in finding the petitioners guilty of contempt summarily. There was no reason for the Judge to disqualify himself or order a change of venue as the contempt was committed in his presence. His summary action was necessary to maintain the authority and dignity of the court over which he presided.

The naked allegation in the petition made on page 11 that Judge Holladay "displayed that he too was affected by the prejudice which gripped so many other members of the

community" is not borne out by the evidence and is a mere conjecture on the part of counsel. This statement casts aspersion on Judge Holladay, an able member of the State judiciary, which counsel for the Commonwealth deeply resent.

Mr. Justice Whittle, in the Court's opinion on behalf of the Supreme Court of Appeals of Virginia in the case at bar, made this apt observation:

> "It would strain one's imagination to picture a clear example of contempt, either at common law or under the statute." (205 Va. 338).

If attorneys are permitted to insult judges as these petitioners did Judge Holladay, and not be punished, then the judicial system, both Federal and State, will be weakened and fall into disrepute.

CONCLUSION

We maintain that the petition fails to present a substantial federal question. The petitioners were accorded due process of law and the judgment of the Supreme Court of Appeals of Virginia does not deprive them of any rights guaranteed under the Constitution of the United States, and that the said judgment is correct and should be affirmed

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to Melvin L. Wulf, Esq., Leslie Harold Levinson, Esq., Joseph A. Jordan, Esq., Edward A. Dawley, Esq., and Len W. Holt, Esq., counsel for petitioners, by depositing the same in a United States post office mail box, with first class postage prepaid, at their addresses shown of record to be c/o American Civil Liberties Union, 156 Fifth Avenue, New York 10, New York, on this 18th day of December, 1964.

D. GARDINER TYLER
Assistant Attorney General

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 464

L. W. HOLT and E. A. DAWLEY, JR.,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 464

L. W. HOLT and E. A. DAWLEY, JR.,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Appeals of Virginia is reported at —— Va. ——, 136 S. E. 2d 809, and is contained in the record at R. 28-41.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on June 15, 1964. A petition for certiorari was filed in this Court on September 8, 1964. Certiorari was granted on January 18, 1965. The jurisdiction of this Court rests on 28 U. S. C. Section 1257(3).

Statutory and Constitutional Provisions Involved

United States Constitution, Amendment Fourteen, Section 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

Code of Virginia (1950), Section 18.1-292:

> The Courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> (1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
>
> . . . . .
>
> (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
>
> (4) Misbehavior of an officer of the court in his official character.

Questions Presented

1. Whether a summary conviction for contempt by a state court violates the due process clause of the Fourteenth Amendment where the conviction is based solely upon pertinent allegations made in a motion for change of venue in pending proceedings, and where the contemnors, petitioners herein, are respectively the lawyer who presented

and argued the motion and the party on whose behalf the motion was made.

2. Whether a summary contempt conviction violates the due process clause of the Fourteenth Amendment where it clearly is but one episode in a persistent history of harassment to which petitioners, both Negro lawyers, have been subjected in connection with their representation of citizens attempting to enforce constitutionally guaranteed rights in Virginia.

Statement of the Case

Petitioners are both Negro members of the Virginia Bar, and partners in the former law firm of Jordan, Dawley & Holt, Norfolk, Virginia. In October, 1961, Dawley represented the defendants in a libel suit styled *Hopewell News, Inc.* v. *Curtiss Harris et al.* which was tried in the Circuit Court of the City of Hopewell, Virginia, presided over by Judge Carlton E. Holladay (R. 4). Immediately after the suit was dismissed, Judge Holladay asked Dawley a question concerning the unavailability of certain defendants for whose appearance subpoenas had been issued. Dawley did not then answer the question. Judge Holladay issued a rule to show cause why Dawley should not be held in contempt of court for his refusal to answer the question (R. 5). Before the hearing date, Dawley filed a motion requesting Judge Holladay to disqualify himself from the contempt hearing (R. 5). When this motion was denied, Dawley filed a motion for a change of venue for the contempt hearing (R. 6).

The contempt trial came on for hearing before Judge Holladay on January 30, 1962. Holt appeared as counsel for Dawley, who was also present. Judge Holladay in-

dicated he was ready to hear the motion for change of venue. Thereupon Holt read and argued the motion (R. 11-15).

Before ruling on the motion, Judge Holladay summarily held Holt and Dawley in contempt of court, solely because of the contents of the motion and the oral argument by Holt in support thereof (R. 16). The judge certified (R. 23-24) that the following occurred:

"The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr. and his counsel had said that the Court 'is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.'

"The Court further pointed out that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr.; viz., Leonard W. Holt.

"The Court further pointed out the allegations in Paragraph (10) of the motion and called attention to the statement in the record that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell.

"The Court pointed out the statement made and appearing in the record that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and before the Court.

"The Court then further pointed out the nature of the limited apology.

"Whereupon and immediately before the Court fixed their punishment both defendants tendered a general apology.

> "The Court then fined both E. A. Dawley, Jr. and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty."

The Supreme Court of Appeals of Virginia, in affirming the conviction, found that petitioners' conduct, as described in the judge's certificate, *supra,* came within the purview of Section 18.1-292 of the Code of Virginia (1950) as amended (R. 35-36).

In view of the summary nature of the contempt conviction, it was impossible for petitioners to raise any federal questions, or to interpose defenses of any kind, before being convicted. Petitioners raised the federal questions in their petition for writ of error to the Supreme Court of Appeals of Virginia, a copy of which was subsequently accepted as their brief in that court.

The opinion of the Supreme Court of Appeals of Virginia explicitly passed upon and rejected the federal constitutional claims raised by petitioners (R. 39-41).

The nature of the case at bar requires a brief mention of certain related circumstances.

The law firm of Jordan, Dawley & Holt, in which petitioners were partners, frequently represented clients attempting to enforce constitutionally guaranteed rights in Virginia and other southern states. The nature of the firm's practice was noted in *Jordan* v. *Hutcheson,* 323 F. 2d 597 (CA 4, 1963) in which the United States Court of Appeals for the Fourth Circuit considered an appeal from the dismissal of a complaint filed by the partners in the above-mentioned law firm against state officers under the Civil Rights Acts, 42 U. S. C. Secs. 1981 and 1983. The complaint alleged that the defendants were conspiring to intimidate, discourage and impede the plaintiffs and all Negro citizens

of Virginia from using the courts as a means of ending racial discrimination in that state, and that certain Virginia officials had investigated the friends and clients of plaintiffs, urged and asked their clients to abandon them, raided the offices of plaintiffs and their clients seeking to gather confidential papers and notes, and published statements naming plaintiffs as violators of the law.[1]

The incident which precipitated the *Jordan* case occurred on September 17, 1961. 323 F. 2d at 599. Just three weeks later, on October 5 and 6, 1961, petitioner Dawley appeared before Judge Holladay in the Circuit Court of the City of Hopewell as counsel for the defendants in *Hopewell News, Inc.* v. *Curtiss Harris et al.*, in which a local newspaper claimed $45,000.00 damages for libel against several leaders of the Hopewell, Virginia civil rights movement (R. 19-20). It was petitioner Dawley's conduct in the *Hopewell News* case which was at issue in the hearing on January 30, 1962 on the show cause order; it was the conduct of petitioners Dawley and Holt at the January 30, 1962 hearing which resulted in the summary contempt convictions in issue here.

Summary of Argument

I. A litigant has the right to the effective assistance of counsel. An attorney has both the right and the duty to represent his client effectively. Petitioners' convictions for contempt violate the Fourteenth Amendment because they suppressed the constitutionally protected right to counsel.

The motion to change venue could not constitutionally be the basis for contempt convictions because its language

[1] The surrounding circumstances are described more fully in Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51.

was relevant to the relief sought, it was presented in good faith, and it was presented respectfully.

II. Petitioners' summary contempt convictions violate the Fourteenth Amendment because (1) the constitutional requirements of a fair hearing in a contempt proceeding were not met, and (2) it was not decided by a disinterested judge.

The Constitution permits summary contempt proceedings only when the alleged misconduct was committed in open court in the judge's presence; when it was personally observed by the judge; when it disturbed the court's business; and when failure to punish would have demoralized the court's authority. None of these elements were present in the trial court below.

Due process precludes a judge from hearing a contempt proceeding for alleged misconduct before him when he has become personally embroiled. By the nature of the case at bar, the trial judge was constitutionally compelled not to sit in judgment on petitioners' alleged contempts because of his personal involvement.

III. The petitioners habitually represented civil rights clients in Virginia, clients unpopular in the dominant community. Petitioners' convictions were one more episode in a long history of harassment by state officials who opposed and hoped to inhibit petitioners' activities.

ARGUMENT

I.

Petitioners' legitimate motion for a change of venue cannot, consistent with the guarantees of the due process clause, amount to a contempt of Court on the part of either the attorney who made it or the litigant on whose behalf it was made.

A. *The conviction of petitioners denied petitioner Dawley, the litigant, the right to the effective assistance of counsel and the right to be prosecuted in an impartial forum, and denied petitioner Holt, the litigant's attorney, the correlative right to provide effective representation to his client, all in violation of the due process clause of the Fourteenth Amendment.*

The constitutionally guaranteed right to counsel means zealous and active counsel, not merely *pro forma* representation. *Powell* v. *Alabama,* 287 U. S. 45, 58 (1932). It is not only a client's right, but it is an attorney's duty to supply effective representation.[2] In *Offutt* v. *United States,* 348 U. S. 11, 13 (1954), this Court held that "counsel must be protected in the right of an accused to 'fearless, vigorous and effective' advocacy. . . ." In *In Re McConnell,* 370 U. S. 230, 236 (1962), this Court recently reiterated that it would protect "a lawyer in presenting his client's

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[2] This duty is recognized by the Canons of Ethics of the American Bar Association.

". . . [T]he lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits . . ." Canon 5.

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' to the end that nothing be taken or withheld from him . . ." Canon 15.

case strenuously and persistently . . ." Moreover, "An advocate is at liberty . . . to combat and contest strongly any adverse views of the judge . . . , to object and protest against any course which the judge may take, and which the advocate thinks irregular or detrimental to the interests of his client. . . ." Oswald, *Contempt of Court* (3rd Ed. Robertson, 1911), pp. 56-57.[3]

It is virtually self-evident that any enforced modification of the duty of zealous representation will seriously limit a litigant's right to effective counsel. In constitutional effect, it would be tantamount to a denial of the full measure of that right. See *Powell* v. *Alabama, supra; Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

Similarly, an attorney's recognized right to practice his profession is adversely affected. As this Court said in *NAACP* v. *Button,* 371 U. S. 415, 439 (1963), ". . . a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." See *Schlesinger* v. *Musmanno,* 367 Pa. 476, 81 A. 2d 316 (1951).

Likewise, the right to a change of venue is a constitutional right, provided, of course, that a fair hearing cannot be had in the regular forum. *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Moore* v. *Dempsey,* 261 U. S. 86 (1923). The assertion of that right

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[3] Oswald reports the following exchange between Erskine and Buller, J., where Mr. Erskine insisted that the word "only" should be inserted in a certain verdict: "At length Erskine said, 'I stand here as an advocate for a brother citizen and I desire that the word "only" be recorded'; whereupon Buller, J. said, 'Sit down, Sir! Remember your duty, or I shall be obliged to proceed in another manner,'—to which Erskine retorted, 'Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.' The Judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as 'a noble stand for the independence of the Bar.'" Oswald, *Contempt of Court* (3rd Ed. Robertson, 1911), pp. 51-52.

was the heart of the motion which was the basis of the contempt convictions at bar, but the substance of the motion became so engulfed in the contempt proceedings, that one can reasonably conclude that the application itself received less than fair consideration. We would suggest, indeed, that the court's contempt ruling inevitably foreshadowed the adverse ruling on the motion itself. Certainly, if a court finds the mere filing of a motion contemptuous, it will hardly give any attention to its merits. Thus, the precipitous contempt ruling denied petitioner Dawley the fair hearing to which the motion was entitled. See *Moore* v. *Dempsey, supra.*

B. *The motion to change venue cannot be considered a contempt of court because it satisfied all the criteria of legitimacy.*

The record is clear that both petitioner Holt as counsel and petitioner Dawley as client were summarily held in contempt of court solely for filing and subsequently reading a motion for a change of venue. Of course, it is not inconceivable that the contents of a pleading might properly be found contemptuous. We need not speculate on the character of such pleadings, however, for the language contained in the venue change motion in issue does not remotely approach the outer perimeter of decorous pleading.

The trial court's certification of contempt (R. 23) contains three specifications of allegedly contemptuous allegations by petitioners: (1) that the Court "is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge"; (2) that the Court harassed and intimidated Mr. Holt; and (3) that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell, either before a jury or before the Court.

This Court has not had occasion to describe explicitly the perimeter of permissible language in circumstances such as these, but the implication is clear from related cases that there is nothing contemptuous in the language used in petitioners' motion.

Language similar to that used in the motion, appears in at least two reported cases of this Court reversing contempt convictions by Michigan one-man grand juries. Mr. Justice Rutledge, concurring in *In Re Oliver*, 333 U. S. 257, 278 (1948), described the Michigan system as combining "in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." And Mr. Justice Black, in this Court's opinion in *In Re Murchison*, 349 U. S. 133, 139 (1955), criticized "the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant." An attorney cannot be criticized, much less held in contempt, for adopting relevant language which appears in the opinions of this Court.

Examination of federal and state cases leads to the identical conclusion that the language in issue here is wholly unexceptionable. The rule which emerges from these cases[4] is that an attorney who files or presents a motion is absolutely protected from contempt as long as the motion is

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[4] These cases arose from motions to change venue as well as motions to disqualify judges, but both motions seek to serve the same end—changing the trial atmosphere for the benefit of the defendant. This can be done by either removing the trial to another court (and another judge), or by replacing the judge. It follows that the propriety of language used in either category is relevant. See Frank, Disqualification of Judges, 56 Yale L. J. 605, 619-620 (1947). Many decisions use the two interchangeably. See, e.g., *Tjosevig v. United States*, 255 Fed. 5, 6 (9th Cir. 1919) ("affidavit for change of venue or change of judge on grounds of prejudice and bias").

(1) relevant to the relief being sought; (2) presented in good faith; and (3) expressed in respectful language and manner. *Johnson* v. *State*, 87 Ark. 45, 112 S. W. 143 (1908); *Woolley* v. *Superior Court*, 19 Cal. App. 2d 611, 66 P. 2d 680 (1937); *In Re Cottingham*, 66 Colo. 335, 182 P. 2 (1919); *Zarate* v. *Culbreath*, 150 Fla. 543, 8 So. 2d 1 (1942); *Blankenbaker* v. *State*, 201 Ind. 142, 166 N. E. 265 (1929); *State* v. *Simone*, 154 La. 73, 97 So. 302 (1923); *Ex Parte Curtis*, 3 Minn. 274 (1859); *Ex Parte Howell*, 273 Mo. 96, 200 S. W. 65 (1918); *State ex rel. Moser* v. *District Court*, 116 Mont. 305, 151 P. 2d 1002 (1944); *LeHane* v. *State*, 48 Neb. 105, 66 N. W. 1017 (1896); *Ponder* v. *Davis*, 233 N. C. 699, 65 S. E. 2d 356 (1951); *Hunt* v. *State*, 27 Ohio C. C. 16, aff'd *State* v. *Hunt*, 72 Ohio St. 643, 76 N. E. 1132 (1905); *Commonwealth* v. *Sheasley*, 102 Pa. Super. 384, 157 A. 27 (1931).

> "... [I]t is the right of a party and of his counsel to apply to the judge before whom a case is pending for the purpose of having another judge try the case because of prejudice of the first judge which would prevent an impartial trial, and ... the presenting of such an application in respectful language and in a respectful manner is not of itself contempt of court." *Tjosevig* v. *United States*, 255 Fed. 5, 7 (9th Cir. 1919).

If the grounds asserted are "pertinent to the obtention of the relief ... sought ... [they] cannot be made the basis of a proceeding against him for contempt of court." *State* v. *Nunez*, 147 La. 394, 408, 85 So. 52, 57 (1920).

As long as the standards of relevancy, good faith and respectfulness are satisfied, there can be no contempt notwithstanding the fact that the statements in the motion

"may necessarily . . . reflect adversely upon the conduct and character of the judge." *Whiteside* v. *State*, 148 Conn. 77, 81, 167 A. 2d 450, 452 (1961).[5]

That these three conditions were amply met in this case is unmistakably demonstrated by the record.

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[5] The language held contemptuous in the case at bar is mild by any standard. Compared to other cases in which language was explicitly found not contemptuous, or not even suggested as being contemptuous, the language here is gentleness itself. For example, see *Woolley* v. *Superior Court, supra* (motion for disqualification alleged that judge had indicated his belief in defendant's guilt during the course of the trial and that he participated at trial in order to obtain evidence favorable to the plaintiffs); *Walker* v. *People*, 126 Colo. 135, 248 P. 2d 287 (1952) (motion for disqualification alleged that judge "has previously expressed and exhibited a determination to bring about a conviction, and if possible, the execution of the petitioner, regardless of the law or facts . . . "); *Blankenbaker* v. *State, supra* (motion for disqualification alleged that judge announced to the jury "that he knew enough of the record to send defendant to the electric chair"); *Callahan* v. *Callahan*, 30 Idaho 431, 165 P. 1122 (1917) (motion for change of venue alleged that opposing party's friendship and influence with judge made fair trial impossible); *State* v. *Simone, supra* (motion for disqualification alleged that the judge had instigated the prosecution "as a last and desperate attempt to punish the accused for not supporting him in the last preceding election"); *State ex rel. Moser* v. *District Court, supra* (litigant moved for disqualification on ground that the "Court has been charged with stealing a receipt for $3000 which I trusted them with . . . "); *Le Hane* v. *State, supra* (affidavit of prejudice alleged that judge silently concurred in his son's threat to prevent affiant from practising law because of a political dispute); *Ponder* v. *Davis, supra* (motion for disqualification alleged that judge took an active part in opposing party's political campaign and that "the great majority of the people . . . regardless of the decision of the court . . . would feel that political considerations were the determining factor"); *State* v. *Brown*, 8 Okla. Crim. 40, 126 P. 245 (1912) (prosecution charged that judge "did at various and sundry times have private and secret consultations relative to and pertaining to the merits of the case" with the defendant); *Commonwealth* v. *Sheasley, supra* (motion for disqualification charged judge with cooperating with opposing counsel to defeat petitioner's cause).

1) *Relevancy.* The purpose of the motion to change venue was to avoid trial by Judge Holladay of a contempt proceeding against petitioner Dawley because of his refusal to answer certain questions asked by the Judge, following the dismissal of a libel action against Dawley's clients (R. 5). It is surely relevant for an attorney or litigant who seeks a change of venue on the ground that the trial judge is biased to allege precisely that, and also to allege harassment and intimidation by the judge. *A fortiori*, for an attorney faced with a contempt trial before a judge alleged to be not impartial, and alleged to have harassed and intimidated him, it is certainly relevant to move for change of venue on the grounds that the Court "is now in effect and/or in fact" assuming the combined role of prosecutor and judge.[6] It is particularly relevant for an attorney, trained to function in an adversary system where there is careful separation of function, to complain of this one-man amalgamation when he himself is charged with contempt. To request a different judge, one surely does not plead an irrelevancy to claim that the present judge is "in effect and/or in fact" your prosecutor. Cf. *In Re Murchison, supra; In Re Oliver, supra.*

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[6] The objective truth of this part of the "accusation" can hardly be questioned. In an ordinary criminal proceeding there is a separation of functions between arrest, indictment, prosecution, direct testimony, rebuttal testimony, and judgment. A large number of persons are involved, each playing his own prescribed role. This is obviously not so in a contempt proceeding. Judge Holladay, and no one else, issued the rule to show cause (compulsory criminal process equivalent to summons or arrest by a police officer); there was no one other than Judge Holladay who would determine whether or not there was probable cause for the defendant to be tried (equivalent to indictment by grand jury); Judge Holladay would be in fact the principal (if not the only) witness, since the charge was contempt for refusing to answer his questions. And Judge Holladay of course would preside in judgment over all of these proceedings.

The Supreme Court of Appeals of Virginia pronounces it as "well settled" that a venue change motion "must confine itself to pertinent facts relied upon to establish that ground" (R. 37). We submit that an abundance of "pertinent facts" was set forth in the motion, including, for example: the nature of the libel suit against Dawley's clients (R. 12); the fact that there was considerable community hostility expressed towards petitioners and their clients in newspaper articles published during the course of the litigation (R. 13); that radio coverage of the proceedings was likewise hostile and prejudicial to their side of the controversy (R. 13); that the contempt proceeding, with respect to which the venue change motion was made, was initiated by and would be tried before the same judge who presided over the libel case (R. 13); that this judge had stated that he was investigating the conduct of petitioners (R. 13); that police officers had called upon petitioners' clients "at their homes and places of business on at least two occasions to harass and intimidate them" (R. 14); that the Clerk of the Court had testified for the prosecution (R. 14); that both the Clerk and the Commonwealth's attorney had participated in these events "other than in their official capacity," that they had refused to disqualify themselves, and the Judge had refused to disqualify them from participation in the contempt proceeding (R. 14); and that because of their enormous hostility to Mr. Dawley's clients and certain "boycotts, pickets and demonstrations . . . , the white people of Hopewell, Virginia, are so greatly aroused against E. A. Dawley, that it is probable that he will not obtain a fair trial in the City of Hopewell, Virginia" (R. 14-15). If the Supreme Court of Appeals of Virginia concluded that these were not

"pertinent facts", they must have been reading some other record.[7]

2) *Good faith.* The court below expressly ruled that the motion was not "addressed, in good faith, to the sound discretion of the trial court" (R. 37). Its reasons seem to have been that (a) there is no Virginia statute "which could require a judge to disqualify himself in a contempt proceeding," and (b) the motion did not "confine itself to pertinent facts." That the second stated reason is palpably erroneous is evident from the record.[8] The first assigned reason is a classical non-sequitur, for the absence of a compulsory disqualification statute has nothing to do with whether or not a venue change motion is made in good faith. The Virginia Supreme Court seems to be saying that any venue change motion is automatically suspect. But it makes no difference, insofar as good faith is concerned, whether the statute is compulsory or discretionary. Even assuming a statute which forbids such motions in their entirety, an attorney who makes it, expecting that it will be denied but seeking to preserve a record for appeal, is surely not acting in bad faith.[9] As the Supreme Court

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[7] If the Virginia Supreme Court intended to concede that there were some "pertinent facts", but that the motion was contemptuous because it did not "confine itself" to pertinent facts, it totally failed to specify what it considered not pertinent.

[8] See discussion *supra*, p. 15. Moreover, even an irrelevant statement in support of an application to disqualify a judge is not contemptuous "if it is made by the attorney in good faith to protect the interests of his client, and in the honest belief that it is relevant, and without reckless disregard of the truth or intent 'to impair the respect due to' the court." *Matter of Rotwein*, 291 N. Y. 116, 123 (1943).

[9] Cf. *In Re Henry*, 369 Mich. 347, 362, 119 N. W. 2d 671, 679 (1963): ". . . It is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable. . . . If the ruling is adverse, it is not counsel's right to resist it or to insult the judge, but only respectfully to preserve his point for appeal."

of California held in *Gallagher* v. *Municipal Court of City of Los Angeles*, 31 Cal. 2d 784, 788, 192 P. 2d 905, 908-9 (1948):

> "But certainly a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so *even though he may not expect to be successful*, provided of course, that he does not resort to deceit or to wilfull obstruction of the orderly processes." (Emphasis added.)

A mistake in law is hardly inconsistent with good faith. To the extent that the Virginia courts seek to justify petitioners' convictions because of a claimed lack of good faith —established *ipso facto* by a claimed mistake of law—they are plainly in error.[10]

3) *Respect.* Neither the judgment of conviction, nor the "Statement of Facts and Incidents of Trial," nor the transcript of the trial itself, nor anything else in the record, contains any express rulings, findings, observations, or comments by the Judge bearing on whether or not the motion was respectfully tendered. There is present "neither proof nor finding that the statements . . . were made in a disrespectful or insolent manner or in bad faith." *Matter of Rotwein*, 291 N. Y. 116, 122, 51 N. E. 2d 669, 672 (1943).[11]

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[10] This Court has held it a violation of due process to impose a contempt conviction on an attorney without a proper hearing where the contemnor's alleged wrongdoing consisted in giving legal advice to his clients which the courts of Ohio held erroneous, but this court held "arguably" not so. *In Re Green*, 369 U. S. 689, 693 (1962).

[11] The California Supreme Court appears to have adopted a rule which goes further to protect attorneys from a situation which "invites caprice" on the part of a judge who regards himself as the injured party and metes out punishment. Even if there are express findings in the contempt order that the "'tone, the look, the manner and the emphasis' were contemptuous," the

But the Virginia Supreme Court of Appeals has in effect issued findings of fact even though the sentencing judge did not. It said, "It would be difficult to imagine a more callous attack"; "The language employed . . . was intended to be insulting"; "The motion . . . was . . . a studied attempt to smear the judge" (R. 35). Of course there is no warrant in the record for any of this.[12] They are no more than the court's own subjective evaluations of what transpired below.[13]

The most that can be said in defense of the court below is that it held that the mere making of such a motion, and its contents, *ipso facto* constituted disrespect regardless of manner of presentation and demeanor. But advocacy in-

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appellate courts will nevertheless carefully review the record and make their independent appraisal. ". . . It is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempt respecting the demeanor of the contemnor." *Gallagher* v. *Municipal Court of City of Los Angeles*, 31 Cal. 2d at 797, 192 P. 2d at 914.

[12] "It contains no citation of any part of the record to support it. . . ." *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 806, 809 (7th Cir. 1961).

[13] Throughout its opinion, the Virginia Supreme Court evinces great and perhaps injudicious hostility to petitioners. In addition to the excerpts previously cited, the following may be noted: Mr. Holt's response to the contempt citation is characterized as "long and rather incoherent" (R. 32). The motion itself, the court says, "was simply used as a vehicle to heap insults upon the court" (R. 35). There is a broad suggestion that petitioners "shirked" their duty "under the guise of representing the interests of a party litigant" (R. 36). The disclaimer of intentional disrespect is described as "so-called," and "supposed" (R. 37, 38), and ridiculed as "unintelligible" (R. 38). Finally, petitioners' professional ability is questioned by a totally gratuitous observation concerning their "lack of knowledge of the established law" (R. 39).

cludes the right to point out "asserted inadequacies in the action taken by the court. . . . It does not appear here that the petitioner was overstepping the bounds of propriety by merely expressing an opinion that a prior order of the court defeated the ends of justice." *Raiden* v. *Superior Court of Los Angeles County*, 34 Cal. 2d 83, 86-87, 206 P. 2d 1081, 1083 (1949). This Court has seriously questioned whether a statement by a lawyer that he would continue to press his point and ask questions forbidden by the judge until stopped by a bailiff could in and of itself amount to contempt where in fact this eventuality did not come to pass. *In Re McConnell*, 370 U. S. 230 (1962).[14]

The Virginia Supreme Court of Appeals was also critical of petitioners' apology, holding that even if it were offered as a "disclaimer of intentional disrespect," it was not acceptable as such.[15] Regardless of questions of purging, limited apology, or general apology, Mr. Holt's statement, fairly read, is in fact a disclaimer of intentional disrespect. Mr. Holt said, *inter alia* (R. 22-23):

> ". . . We at this point would disavow any subjective intent, and to that extent would apologize to the Court.
>
> ". . . We say that our intent was not to be contemptuous; and if objectively this result is reached by looking at them [the statements in the motion] without going into our inward intent, we would say we apologize.

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[14] The precise holding in *McConnell*, that the judge could not proceed summarily under those circumstances, is discussed in Point II of this brief, *post*.

[15] R. 37-38. The only observation by the trial judge on the apology was as follows:

> "The Court further pointed out the nature of the limited apology.
>
> "Whereupon and immediately before the Court fixed their punishment, both defendants tendered a general apology" (R. 23).

"... The statements were made in the best of faith based upon a conclusion drawn from certain objective manifestations.

"... We would welcome from the court a suggestion as to how to restate the idea so as not to be contemptuous, because this [is] not our intent.

"The only thing we want in the record is that there is reason for a change of venue.

"We ... disavow any intent in certain statements to be contemptuous of the Court."

Mr. Holt quite evidently was expressing to the court his opinion that there were good and sufficient grounds for a change of venue, and that they were stated in the motion in good faith. Since the grounds included the alleged lack of impartiality of the judge, they had to be stated.

The logic of the opinion below is that the only acceptable apology would have been withdrawal of the motion. Obviously, Mr. Holt's duty to his client prohibited such surrender. See *Matter of Rotwein*, 291 N. Y. 116, 122, 51 N. E. 2d 669, 672 (1943). Instead, he stated and sought to reiterate the distinction between the bona fide attempt to plead sufficient facts for the relief sought, and any overlay these words may have had in terms of being regarded by the judge as disrespectful, insulting, or contemptuous. The distinction between his *subjective* intent not to be disrespectful, and whatever might be the *objective* effect of the words used, was therefore a most valid way of expressing this dilemma.[16]

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[16] The Supreme Court of Georgia recently held in *White* v. *State*, 218 Ga. 290, 292-293, 127 S. E. 2d 668, 670 (1962):

"Mr. White was within his rights, as a lawyer, to state his client's contention in the case. In doing so he was amenable

II.

Petitioners' summary contempt convictions deprived them of the fair hearing required by due process of law.

A. The constitutional prerequisites which this Court has held necessary to justify summary proceedings in a narrowly circumscribed area of contempts have not been met; consequently, the court had no power to proceed in a summary fashion.

The constitutional requirements of a fair hearing in a contempt case have been stated by this Court on several occasions but most explicitly in *In Re Oliver*, 333 U. S. 257, 275 (1948):

> "Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case [*Cooke* v. *United States*, 267 U. S. 517 (1925)], requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually

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to the court for his outward manifestations, but not for his innermost thinking."

This suggests an even broader standard: One can indeed have most disrespectful thoughts about judges, but sanctions can not be imposed absent overt manifestations. But the Virginia Supreme Court of Appeals did not hesitate to probe petitioners' states of mind and concluded that there was not only an intention to be insulting, but "a studied attempt" to smear the judge (R. 35).

> observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' [*Cooke, supra,* at 536] before the public."

These "due process requirements" can be dispensed with, and a court can proceed in summary fashion, only in an aggravated situation, demonstrated by the simultaneous presence of all of the following conditions:

1) The misconduct must be committed in open court and in the presence of the judge.

2) The court must actually and personally observe the entire episode.

3) The misconduct must be of such a nature that it disturbs the court's business.

4) The misconduct must be of such a nature that failure to impose immediate punishment would cause "demoralization of the court's authority."

The first two conditions are objective, and their presence or absence in this case can be tested by the record. Therefore, except for the argument (post, p. 24) that under no circumstances did Mr. Dawley—who sat silently throughout the proceedings—commit any act at all "in open court, in the presence of the judge," petitioners' concern is primarily[17] with the two other conditions: disturbance and "demoralization". We believe that the record shows unambiguously that there was neither disturbance of the court's business, nor demoralization of its authority; consequently, there was no basis whatsoever for the application of the extraordinary summary power.

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[17] It might be noted, however, that the essence of the alleged misconduct—the contents of the venue change motion—occurred, if

The disturbance element has been defined by this Court as "obstruction to the performance of judicial duty." *In Re McConnell, supra,* at 234. In that case, an attorney who was in sharp disagreement with the court over a question of law, refused to discontinue a line of questioning in the face of an express direction by the court. He stated that he would continue to ask his questions "unless some bailiff stops us." *Id.* at 235. But he subsequently did desist before being physically restrained, though obviously aware of what might be forthcoming had he not. Yet this court observed "that there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice," *id.* at 235-236, and a summary contempt conviction was reversed.

In case at bar there was no failure to desist after warning, no verbal clash with the judge, indeed no resistance to any judicial direction at all. Much less was there any physical obstruction. Compare *Ex parte Terry,* 128 U. S. 289 (1888). There was plainly no obstruction, disturbance or disruption of any kind.

The phrase "demoralization of the court's authority" has not been precisely defined. But this Court has held that such "demoralization" does not occur when the alleged contemnor has done no more than raise an "arguable" question of the court's jurisdiction. *In Re Green, supra,* at 692-693. In effect, petitioners here, by moving to change venue on grounds of lack of impartiality of the judge, were doing just that. As was said in *Oliver, supra,* at 278:

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at all, when the motion was filed, thirteen days prior to the oral argument in support of it. Thus, when first uttered, any misconduct here was plainly not "in open court, in the presence of the judge." It was not until the motion was read, at the judge's direction (R. 11), that anything at all occurred in open court.

"The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'"

B. *Since Mr. Dawley did not commit any act in open court, there was absolutely no warrant to proceed against him summarily.*

It is clear from the record that Mr. Dawley said absolutely nothing in open court. Nowhere in the transcript (R. 8-24) is there a single word spoken by Mr. Dawley, who was present in court as a party not as an attorney.

The motion to change venue was filed on January 17, 1962 and signed by Mr. Dawley, pro se (R. 6). Thirteen days later, on January 30, 1962, when the first contempt case was called for trial, Mr. Holt read the motion verbatim into the record as the major portion of his oral argument in support of the motion (R. 11-15). The following colloquy then took place:

"The Court: As I understand it, you have filed a copy of the motion you substantially made in the record in the case here. I believe you read from that?

"Mr. Holt: That is correct.

"The Court: And it is signed by Mr. Dawley?

"Mr. Holt: That is correct, sir.

* * * * *

"The Court: I notice that the pleading was filed apparently in person rather than by you as counsel.

"Mr. Holt: Well, it was signed by him . . .

"The Court: I was just merely asking—I saw it was signed by him there and not signed by you as counsel, but you appeared here today as counsel.

Is that correct? You have argued the motion. I understood that you appeared as counsel.

"Mr. Holt: I think that's what I have done, sir. It's before the Court" (R. 15-16).

The court evidently took pains to point out that the motion read by Mr. Holt was identical with the motion which had been signed by Mr. Dawley. But other than this association, tangential at best, Mr. Dawley did nothing before Judge Holladay.

As shown above, this Court has established four conditions which must be met before a court may use its extraordinary summary contempt power. The first of these conditions requires that the allegedly contumacious act occur "in open court, in the presence of the judge". That Mr. Dawley did absolutely nothing at all, much less anything contumacious "in open court, in the presence of the court" is so clear, that further argument would belabor the obvious. Accordingly, his conviction should be reversed for this additional ground. *Cooke* v. *United States, supra,* at 536.

C. *A motion for change of venue or judicial disqualification, based on allegations of the lack of the judge's impartiality, necessarily creates such a condition of intense personal involvement on the part of the judge that any contempt proceedings arising from such motion must be heard before a disinterested judge.*

This Court has held in several cases that the requirements of due process are not met by a hearing before the same judge before whom a contempt was allegedly committed, where the judge becomes personally embroiled in the events leading to the alleged contempt. See *Cooke* v. *United States, supra; Offutt* v. *United States,* 348 U. S. 11 (1954); cf. *Ungar* v. *Sarafite,* 376 U. S. 575, 585 (1964).

In *Ungar* v. *Sarafite*, this Court ruled that trial of a contempt before another judge was not constitutionally required on the facts of that case, where the record did not "leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner." *Id.* at 585.[18] This case, however, is substantially different.

The measure to be applied is the depth and intensity of the judge's personal embroilment with the alleged contemnor. Admonitions and restraints directed to a witness or a party may or may not amount to an imbroglio sufficient to require trial before another judge to insure due process. But where, as here, the very matter which resulted in the contempt was a challenge to the judge's impartiality, a much stronger case is presented. It is difficult to imagine a judge being more intimately and personally involved than where the precise issue before him is his ability to be a fair judge.

In *Tumey* v. *Ohio*, 273 U. S. 510 (1927), this Court held that even a relatively modest financial interest in the outcome of a case was of sufficient constitutional magnitude to preclude judicial disinterestedness. How much more so when the judge's principal professional and public virtue—the *raison d'être* of his judicial function—is being directly challenged.

The full measure of due process in this case required a nonsummary hearing before a disinterested judge. Cf., Federal Rules of Criminal Procedure, Rule 42(b).

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[18] Furthermore, Judge Sarafite did not proceed summarily. He gave the petitioner notice, and held a hearing at the close of the trial. This Court intimated but did not flatly hold that "a nonsummary hearing was required." In any event, "the hearing afforded petitioner satisfied the requirements of due process." 376 U. S. at 589.

III.

Lawyers who habitually represent citizens attempting to enforce constitutionally guaranteed rights must not, on that account, be subjected to harassment in the form of summary contempt proceedings.

This case presents again the problem of the lawyer who represents an unpopular cause.[19] Petitioners are both Negro lawyers who habitually represent civil rights litigants. Unfortunately, it is a matter of common knowledge that many communities in Southern States, including Virginia, display a deep-rooted and persistent hostility towards the civil rights movement, and especially against lawyers who express its legitimate ambitions.[20] Civil rights lawyers and their clients find themselves attempting to enforce constitutionally guaranteed rights in a community whose most influential members are often their most bitter adversaries.

In recent years frequent attempts have been made to suppress the activities of civil rights lawyers in Southern communities. The attempts often take the form of regulatory measures which, on their face, may appear salutary and impartial, but which in fact are aimed directly against the proponents of civil rights. In a recent case arising in Vir-

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[19] See, e.g., Downs and Goldman, The Obligation of Lawyers to Represent Unpopular Defendants, 9 Howard L. J. 49 (1963); Symposium, The Right to Counsel and the "Unpopular Cause," 20 U. of Pitt. L. Rev. 725 (1959); Cheatham, A Lawyer When Needed (Columbia Univ., 1963); Rostow, The Lawyer and His Client, ABA Journal, January, 1962 and February, 1962.

[20] For expressions of hostility against petitioners herein for their general efforts on behalf of civil rights litigants, see, e.g., Report of the Committee on Offenses Against the Administration of Justice to the Governor and the General Assembly of Virginia (Senate Document No. 16, 1961), pp. 7-8; Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51; *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963).

ginia, this Court pierced the form of a state's purported attempt to regulate, found in substance an attempt to inhibit a constitutionally guaranteed activity, and granted relief to the lawyers and their clients. *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963). See also *Gibson* v. *Florida Investigation Committee*, 372 U. S. 539 (1963); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963). This Court has demonstrated that it will reject all measures, "no matter how sophisticated", which may be employed "in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.*, 366 U. S. 293, 297 (1961). See also *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (DC La. 1964), probable jurisdiction noted 377 U. S. 976 (1964).

The summary contempt proceedings did not occur as an isolated event. Rather, they represent but one more episode in a long history of harassment, indulged in by many state officials and other members of the community as a means of opposing and inhibiting petitioners' activities. In view of the inflamed condition of the community at the time,[21] and with a frank recognition of the problems, the judge should have disqualified himself or granted a change of venue.

We have made previous reference to the constitutional right of a lawyer to represent his client. In *Sacher* v. *United States*, 343 U. S. 1 (1952), while sustaining a contempt conviction on the facts presented, this Court added, *id.* at 13-14.

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[21] In *Harris* v. *Virginia*, —— U. S. ——, 12 L. ed. 2d 1038 and *Allen* v. *Virginia*, 374 U. S. 93 (1963), this Court vacated and remanded unreported Virginia cases, the record of which indicates the conditions prevailing in Hopewell, Virginia.

> ". . . this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence."

See also *In Re Green, supra; Cammer* v. *United States,* 350 U. S. 399 (1955).

These summary contempt convictions must therefore be viewed as punishing petitioners, not only for the events which took place in the courtroom, but also for being active civil rights lawyers. The convictions consequently operate as a judicially imposed impediment to the constitutionally guaranteed activities not only of petitioners but of the civil rights litigants they habitually represent.

Because of the belief that the injustices of racial inequality can be redressed within the framework of the law, lawyers who represent civil rights organizations are frequently in the center of each race relations crisis as it arises. Freedom of association, in the context of contemporary events, certainly includes the freedom of the association's counsel to represent the association and advocate its cause in court as much as it includes the association's right to be represented by counsel. *NAACP* v. *Button.* As Mr. Justice Douglas has said:

> "The citizen should know that in the courts one can get justice, no matter how discriminatory government officials may be . . . " The Bill of Rights is Not Enough, Fourth Annual James Madison Lecture, in Cahn, The Great Rights, p. 146.

CONCLUSION

For the reasons stated above, the convictions should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1964

No. 464

L. W. HOLT AND E. A. DAWLEY, JR.,
Petitioners,

v.

COMMONWEALTH OF VIRGINA,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The conviction of petitioners (hereinafter sometimes referred to as defendants) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the cases of *L. W. Holt* v. *Commonwealth of Virginia*, Record No. 5630, and *E. A. Dawley, Jr.* v. *Commonwealth of Virginia*, 205 Va. 332, 136 S. E. (2d) 809. The two cases were heard together. The judgment of the Court was entered on June 15, 1964.

JURISDICTION

1. Certiorari was granted on January 18, 1965.

2. The jurisdiction of this Court is said to be invoked under 28 U.S.C., Section 1257 (3).

PRELIMINARY STATEMENT

It is well for this Court to bear in mind just what this case really is and not be misled by the distortion of the evidence made by counsel for petitioners, and the unsupported allegations. Counsel would have you believe that these petitioners were punished for contempt because they are members of the bar who represent so-called civil rights litigants. This is not correct. They were punished because they were in contempt of court for the reason they insulted the presiding judge of the Third Judicial Circuit of Virginia, in open court. The power to punish summarily in such cases is clearly prescribed by Virginia statute, Code Section 18.1-292, Code of Virginia[1]

STATEMENT OF THE CASE

E. A. Dawley, Jr. was counsel for the defendants in the case of *Hopewell News, Incorporated* v. *Curtis Harris, et al.* This case was set for trial in the Circuit Court of the City of Hopewell on October 5, 1961. Subpoenas were issued for the appearance of the twelve defendants. The City Sergeant

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[1] "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

"(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Section 18.1-292 Code of Virginia 1950, as amended.

reported to the Court on October 5 that defendants could not be found. The Court directed that other additional subpoenas be issued, returnable on October 6. This direction was done in the presence of E. A. Dawley, Jr. On October 6 the Sergeant again reported that the defendants could not be found.

On that day, an agreement was reached between the parties, and while the dismissal order was being prepared, Curtis W. Harris, one of the defendants who had been twice summoned was seen in consultation with E. A. Dawley in the court room. After the final order was entered dismissing the said suit as "Dismissed Agreed," Judge Holladay had the clerk of the court and counsel, including Dawley, appear before him in chambers. There the Judge "asked Dawley whether he, Dawley, had anything to do with the said witnesses [those having been summoned on two occasions] being unavailable to be served with subpoenas" (R.13). The question was propounded three times to Dawley. He failed and refused to answer. He requested time to consider same. Thereupon, the court directed him to appear on October 10, 1961, at ten o'clock. On that day, he was again given an opportunity to give his answer to the said question, which he failed to do. The matter was continued until December 11th. On that date (December 11) Holt stated to the court that he did not represent Dawley. "I am out of the case at this moment, if there is a case" (R. 10). The Judge then directed the Commonwealth's Attorney to prepare a show cause order against Dawley, which rule was made returnable January 8, 1962, to show why he (Dawley) should not be held in contempt. Dawley moved that the Commonwealth file a bill of particulars, which motion was granted. On January 8 the hearing on the rule was continued until January 30, 1962. Motion for change of venue was filed on January 17, 1962. Pertinent parts thereof are found on R. 2 and R. 3.

The complete stenographic record of the hearing on January 30, 1962, at which time the contempt was committed, is found on R. 16 to R. 29, inclusive. Nothing of any consequence transpired before argument was made by Holt on the *motion for a change of venue* (R. 11). The argument largely consisted of reading the motion to the Court (R. 11 to R. 15). In the course of the argument, the following was stated:

> ". . . The said Honorable Judge Carleton E. Holladay . . . is now in effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carleton E. Holladay did intimidate and harass the lawyer representing E. H. Dawley, Leonard W. Holt, Esq." (R. 13)

The written motion for change of venue which was signed by E. A. Dawley, Jr. contained this statement:

> "The said Judge Carleton E. Holladay . . . has with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecuting witness, adverse witness for the defense, grand jury, chief prosecutor and judge.
>
> "That in addition to the foregoing, said Judge Carleton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq." (R. 2)

At the conclusion of the argument made by Holt, the Court announced "that the plea is contemptuous, I think the argument is contemptuous." At that time, both E. A. Dawley, Jr. and Leonard W. Holt were summarily adjudged to be in contempt of court.

Before fixing the punishment, the Court overruled the motion for a change of venue [in the first contempt case] (R. 17), after which a dialogue between L. W. Holt and the Court ensued in which the defendants registered a supposed disclaimer of intent, which was characterized by the Supreme Court of Appeals of Virginia as follows:

> "These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize."

At the conclusion of this colloquy, the Court fined each of the defendants $50.00. It is from this judgment that an appeal was taken to the Supreme Court of Appeals of Virginia, and is now before this Court.

QUESTION BEFORE THIS COURT

Whether there were grounds for a change of venue or for the disqualification of the judge are not issues in this case. These issues were not presented to the State appellate court for determination as the first contempt case was never brought to a conclusion and neither are these issues presented here.

The only question fairly presented in this court is whether the petitioners were accorded procedural due process in their contempt conviction.

It is the contention of the Commonwealth that the petitioners received the punishment their conduct warranted and all due process requirements were met.

SUMMATION OF THE RESPONDENT'S POSITION

The position of the Commonwealth can be summarized as follows:

I. A Virginia statute empowers a State tribunal to summarily punish for contempt in open court. That statute has been construed by the State courts and applied to the instant case.

II. The State tribunal having found the petitioners guilty of contempt under the State statute, it remains only to determine if the United States Constitution, as construed by this Court, has been impinged upon or circumscribed by the State action.

III. The United States Constitution does not demand notice, hearing, jury trial, or other cloaks of protection contemplated by "due process" in summary contempt cases.

IV. The rights of litigants to plead or pursue remedies, and the privilege of counsel to effectively represent their clients do not extend to unsupported allegations of corruptness, prejudice and unfitness of a trial judge.

ARGUMENT

Petitioners Were Accorded Due Process of Law

I.

Both Client and Counsel Were In Contempt and Were Properly Convicted and Summarily Punished

Petitioners argue, on pages 8 and 9 of their brief, that their conviction for contempt based upon the contents of a motion for a change of venue denied one of them as a litigant in the State Court the right guaranteed by the due process clause of the Fourteenth Amendment to be prosecuted in an impartial forum and denied the other as the litigant's attorney the right to represent his client effectively. Petitioners were not punished for filing and arguing a legitimate motion for a change of venue. They were punished for

filing a motion for a change of venue containing abusive, contemptuous and contemptible language concerning the trial judge, and arguing the motion in open court using the same abusive language.

Counsel would have this Court believe that Judge Holladay's action interfered with Holt's professional duty to effectively represent his client Dawley. This is not correct. The only thing appearing in the record concerning the argument on the motion (exclusive of the motion itself) is this:

"The Court:

* * *

"I believe you all have a plea filed here for change of venue?

"Mr. Holt:
"Yes, sir.

"The Court:
"I'm ready to hear you on that.

"Mr. Holt:
"May it please the Court, the defendant, E. A. Dawley, Jr., represents as follows on motion for change of venue:

(Then follows the argument):

"The Court: Next we have action of the Court on a motion for change of venue. Mr. Jones, do you wish to be heard on that?

"Mr. Jones: No, your honor. I don't think there's any argument that I would present at this time.
"I wholly concur with the Court that that is contemptuous, and I don't propose to answer it at all.

"Mr. Holt: May we at this time, my client and I, ask

again of the Court—the motion for jury trial—My understanding was that you denied this earlier.

"The Court: I have not passed on the motion for jury trial at this time. I think that I would have to pass on the motion for change of venue before I would for a jury trial.

"We first have to find out whether we are going to try it in this Court; and then we will determine whether or not it is a jury trial.

"If there is nothing further to be heard on the motion for change of venue, the Court is ready to rule on it.

"Motion is denied.

"Mr. Holt: May we note an exception, sir.

"The Court: Let the record show the exception."

To substantiate petitioner's argument, counsel cites the case of *Re McConnell*, 370 U. S. 230, 236, quoting certain dictum therefrom. The situation in the *McConnell* case was entirely different from the case at bar. There, the trial court had instructed attorneys to refrain from asking questions on subjects which the court had ruled not admissible. McConnell felt that the trial court was in error in this particular (which in fact it was) and he felt that he must ask the questions in order to make up the record for an appeal (if necessary). He stated to the court that he was going to ask the questions until stopped by some bailiff. Thereupon, the court recessed. After the resumption of the trial, McConnell did not ask the questions. This Court reversed, thereby construing 18 U.S.C.A., Section 401[2], to apply the cases where

[2] "§ 401. *Power of court*

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

the misbehavior of the alleged contemptor amounts to an actual obstruction of the administration of justice. Mr. Justice Harlan pointed out in a dissenting opinion, joined by Mr. Justice Stewart, that he did not believe that the Court intended in its opinion to mean that only a physical obstruction appending judicial proceedings is punishable under the said federal statute, citing many cases decided by this Court to the effect that "the Court's power to punish summarily for contempt has always been available as a sanction against the use of abusive and insulting language" (82 S. Ct. 1293).

Be that as it may, the Court in this case is not called upon to apply the provisions of the federal statute. Here the Court must apply the Virginia statute (Section 18.1-292, Code of Virginia (1950)), which statute is broader than the act of Congress and vests the courts of Virginia with the specific power to punish summarily for contempt as a sanction against the use of abusive and insulting language. The Supreme Court of Appeals of Virginia, in passing upon the question of whether or not the conduct of the petitioners amounted to contempt within the meaning of the Virginia statute, stated (205 Va. 338):

> "We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?
>
> "We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession

"(2) Misbehavior of any of its officers in their offiicial transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra*, §11, page 396. He was charged with:

> "(1) Acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge;
>
> "(2) Harassing and intimidating counsel for the accused;
>
> "(3) Being unable to conduct a fair and impartial trial.
>
> "It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as amended." (205 Va. 338.)

Thus we have a situation here where the highest court of the State has construed one of the statutes of that State to be applicable to a given set of facts. Now petitioners ask this Court to construe those facts differently and say that the Virginia statute is not applicable. Is it for this Court to say that a State is powerless to authorize its courts to punish for contempt committed in the presence of the court under some whim that due process is violated? It would seem to us that the construction placed on a statute and the procedure thereunder placed upon it by the highest court of the State should be followed by this Honorable Court, unless the State procedure *clearly* contravenes the due process clause of the Fourteenth Amendment as this Court has in-

terpreted the same. No such showing has been made in this case that the procedure followed in Virginia has denied the petitioners any constitutional rights; and no relevant cases decided by this Court have been cited by petitioners. We submit that the decision on the Virginia decision made by the Virginia Supreme Court of Appeals should be followed by this Honorable Court. *Leavenworth County* v. *Barnes,* 94 U. S. 70. The general rule in this connection is stated in Sutherland Statutory Construction, 3rd Edition, Horack Volume Two, Sections 2101-5211, Section 4604:

> "The federal courts are bound to follow interpretations of state statues by the state courts of the state in which the statute was enacted. But where the construction of a state statute is governed by the United States Constitution the federal courts will make an independent interpretation of the statute, although the interpretations of the state courts may be given weight in determining the meaning of their laws."

We then direct the Court's attention to the decisions of this Court to determine if the action of the State tribunal has contravened the United States Constitution as so interpreted.

A.

Due Process Does Not Require Notice and Hearing In Summary Contempt

In *Ex Parte Terry,* 128 U. S. 289, 32 L. Ed. 405, 410, in refusing to grant relief in a habeas corpus proceeding to the applicant who was imprisoned as a result of being held in contempt of court, the Court stated:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its

presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice.'

* * *

"We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded 'to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution.' We have seen that is *a settled doctrine* in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed *in the face of the court*, at least one of superior jurisdiction, *the offender may*, in its discretion be instantly apprehended and *immediately imprisoned*, without trial or issue, and without other proof than its *actual knowledge of what occurred;* and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the dis-

> orderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence." (128 U. S. 412.) (Italics supplied).

In *Fisher* v. *Pace,* 336 U. S. 155, 159, 93 L. Ed. 569, 573:

> "Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."
>
> * * *
>
> "The judgment of the Supreme Court of Texas must be affirmed. In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

It is abundantly clear that this Honorable Court has long recognized that courts may punish for contempt when the contempt is committed in the actual presence of the court and that public policy demands that reliance and confidence

must be placed in the presiding judge, be that judge a Federal judge or a State judge. In either category, the judge represents the majesty of the law upon which orderly society rests. His actions in this particular should not be impeded except for compelling reasons. No such reasons appear in the case at bar.

Counsel for the petitioners seek to equate the case at bar with the case of *In re Oliver*, 333 U. S. 257. Similarity between the two cases is totally lacking. Oliver appeared before a circuit court judge who was conducting in accordance with Michigan law a "one man grand jury investigation." The hearing was conducted in the Judge's chambers from which the public was excluded. During the course of the secret session after hearing evidence from another witness and from Oliver, the Judge, believing that Oliver was not telling the truth, summarily held him in contempt. No opportunity was afforded Oliver to offer an explanation or a defense. This Court released Oliver in a habeas corpus proceeding, holding that the commitment constituted a denial of due process on the ground (1) of the secrecy of the proceeding and (2) of lack of reasonable opportunity to be heard on the contempt charge. The case at bar differs from *Oliver* in two respects. First, petitioners were adjudged in contempt in open court and, secondly, no explanation could disprove the fact that petitioners had committed such contempt of the court's authority and dignity which deserved instant punishment. This case comes within the second exception expressed in the dissenting opinion in the case of *Ungar* v. *Sarafite*, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. (2d) 921.[3]

[3] "I would hold, therefore, that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, except when (1) the contempt creates such 'an open threat to the orderly procedure of the court. * * [that if] not instantly suppressed and

In that case *(Ungar* v. *Sarafite)*, the Court, in affirming a judgment of the Supreme Court of New York, held that the remarks of a witness that he was being badgered and coerced and that the Court was suppressing evidence, did not constitute such a personal attack on the Judge as to require his disqualification.

Petitioners' reliance upon the cases of *In re Oliver,* 333 U. S. 257, and *In re Murchison,* 349 U. S. 133 is ill-conceived. The mere fact that certain language was used by this Court in the opinion in the *Oliver* case was not a license for the petitioners to use the same language in the said motion for change of venue where the circumstances and facts of the case at bar are entirely different from those in *In re Oliver*. Certainly, the holding in these cases by this Honorable Court does not divest a State court from punishing for contempt committed in the presence of the Court. This Court, in the case of *Ungar* v. *Sarafite, supra,* clearly differentiates the contempts in these two cases from contempts committed in open court. We quote from the opinion:

> "In re Murchison, 349 U. S. 133, 99 L ed. 942, 75 S. Ct. 623. The Court in the latter case held that a judge acting as a one-man grand jury investigating crime could not convict for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings and is not controlling here. For both In re Oliver, 333 U. S. 257, 92 L. ed. 682, 68 S. Ct. 499, and Murchison make abundantly clear that the Court was not dealing therein with the

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punished, demoralization of the court's authority will follow.' *In re Oliver, supra,* at 275 of 333 U.S., at 508 of 68 S. Ct. 92, 92 L. Ed. 682, quoting *Cooke* v. *United States,* 267 U.S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767, and when (2) 'no explanation could mitigate [contemner's] offense, or disprove the fact that he had committed such contempt of [the court's] authority and dignity as deserved instant punishment.' Ex parte Terry, 128 U.S. 289, 310, 9 S. Ct. 77, 81, 32 L. Ed. 405." (84 S. Ct. 857).

> traditional category of contempts committed in open court, which cannot be likened to the so-called contempts committed in *in camera* grand jury proceedings, especially when the latter are founded upon perjury charges." (3-76 U. S. 584).

To punish summarily for contempt committed in the presence of the court does not violate due process. *Ex parte Terry,* 128 U. S. 289, 313, 32 L ed. 405, 9 S. Ct. 77; *Fisher* v. *Pace,* 336, U. S. 155, 159-160, 93 L ed. 569, 69 S Ct. 425; *Sacher* v. *United States,* 343 U. S. 1, 8, 96 L ed. 717, 72 S Ct. 451; *Green* v. *United States,* 356 U. S. 165, 2 L ed. 2d 672, 78 S Ct. 632; *Ungar* v. *Sarafite,* 376 U. S. 575.

Counsel in the brief on page 10 makes this statement: "for the language contained in the venue change motion in issue does not remotely approach the outer perimeter of decorous pleading."

We do not agree with counsel. It may be customary for attorneys to use such language in pleadings in the jurisdictions in which said counsel habitually practice, but such a practice is simply not tolerated in Virginia where the members of the Bar take pride in maintaining the respect of the courts.

The Supreme Court of Appeals of Virginia had this to say in reference to the duty of attorneys in respect to their relationship with the Court:

> "Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and

motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases annotated on this point in 18 A.L.R. 213, 55 A.L.R. 530; 52 A.L.R. 2d 1297. See also Dangel, 'Contempt,' §118, at page 58; 12 Am. Jur., Contempt, *supra*, §13, at pages 397-398." (205 Va. 339).

B.

No Rights To Plead Or Be Effectively Represented Were Denied In This Case

The petitioners have laid much emphasis in their brief upon the litigant's right to file a pleading in a court. Although this question was dealt with exhaustively in the State court, it may be well to once again explore the nature of this pleading.

Change of venue is unknown in Virginia in contempt cases. Section 19.1-224 of the Code[4] sets forth the authority for change of venue *in criminal cases*. Affidavits of disinterested persons are required to support the application for a change of venue. *Boswell* v. *Flockheart*, 8 Leigh (35 Va.) 364; *Wormeley* v. *Com.*, 10 Gratt. (51 Va.) 658; *Muscoe* v. *Com.*, 87 Va. 460, 12 S. E. 790. It is rather startling to note that not one affidavit of a disinterested person was filed by the petitioners to support the wild allegations in the said motion for change of venue. Hence, Judge Holladay was confronted with bare allegations and nothing more.

In this connection, the Court's attention is invited to the tactics employed by petitioners in the complaint filed in the United States District Court (R. 6).

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[4] "§ 19.1-224. A circuit court may, on motion of the accused or of the Commonwealth, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other circuit or

corporation court and in like manner the court of a corporation may order the venue to be changed to some other corporation or circuit court. Such motion when made by the accused may be made in his absence upon a petition signed and sworn to by him, which petition may, in the discretion of the judge, be acted on by him in vacation; and, whenever the mayor of any city, or the sheriff of any county, shall call on the Governor for military force to protect the accused from violence, the judge of the corporation court of the city or the circuit court of the county having jurisdiction of the offense shall, upon a petition signed and sworn to by the accused, whether he be present or not, at once order the venue to be changed to the corporation court of a city or the circuit court of a county sufficiently remote from the place where the offense was committed to insure the safe and impartial trial of the accused."

LIGON L. JONES, Commonwealth's Attorney of the City of Hopewell, Virginia, and individually
Suite No. 1, Perry Building
Hopewell, Virginia

and

J. HAMILTON HENING, Clerk of the Circuit Court of the City of Hopewell, Virginia, and individually
Circuit Court
Hopewell, Virginia, *Defendants*

COMPLAINT

16. That thereafter, acting under color of law and the authority of his official position, the said Carleton E. Holladay, signed a piece of paper styled a Rule to Show Cause, a copy of which was served on your Complainant in Norfolk, Virginia, (copy attached as Complainant's Exhibit B) which said rule to show cause required that your Complainant appear in said Circuit Court on January 8, 1961 to stand trial for contempt of court for failing to answer said questions propounded by said Carleton E. Holladay. That on January 8, 1962, your Complainant appeared in Court for trial, but the Court continued the case, on the motion of the Commonwealth's Attorney, to January 30, 1962, on the grounds that said Commonwealth Attorney was not prepared for trial, all to the harassment, inconvenience, and expense of the Complainant and for the purpose of intimidating, humiliating and inconveniencing your Complainant.

Filed January 25, 1962
Walkley E. Johnson, Clerk
United States District Court

E. A. DAWLEY, JR.

In the complaint filed in the case instituted by Dawley against Judge Holladay on January 24, 1962 (filed January 25, 1962) in the United States District Court for the Eastern District of Virginia (R.6) seeking, among other things, a temporary restraining order and an injunction against the Judge from proceeding further in the contempt action, there is stated the following:

> "16. That on January 8, 1962, your complainant appeared in court for trial, but the court continued the case, on the motion of the Commonwealth's Attorney to January 30, 1962, on the ground that said Commonwealth's Attorney was not prepared for trial, all to the harassment, inconvenience and expense of the complainant and for the purpose of intimidating, humiliating and inconveniencing your complainant."

This complaint was signed by Dawley and verified.[5]

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[5] UNITED STATES OF AMERICA: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

No. 3414

E. A. DAWLEY, JR., *Complainant*

versus

CARLETON E. HOLLADAY, Judge of the Circuit Court of the City of Hopewell, Virginia, and individually, Wakefield Virginia

STATE OF VIRGINIA
CITY OF NORFOLK, to wit:

This day personally appeared before me, Madilyn J. Cornick, a notary public of and for the City aforesaid in the State of Virginia, E. A. Dawley, Jr., who after being duly sworn, made oath that the statements contained in the foregoing Complaint are true to the best of his knowledge and belief.

E. A. DAWLEY, JR.

Subscribed and sworn to before me this 23rd day of January, 1962.

MADILYN J. CORNICK
(Notary Public)

Holt represented Dawley in this proceeding before Judge Oren Lewis. Judge Lewis in the afternoon of January 29, 1962, refused to act, holding that the case did not fall within any of the exceptions of Title 28, USC 2283, *and that under Title 28 U.S.C. 1342 (3) as amended in 1957, there should be more than bare allegations to justify action.* No further attempt was made by the petitioners to prosecute this case and the same was dismissed for want of prosecution on the 8th day of February, 1965.

In the Statement of Facts and Incidents of Trial* *tendered* by *petitioners* there appears this in reference of what transpired on January 8, 1962:

> "8. Because Dawley had not been served with the said Rule to Show Cause prior to January 8, 1962, the trial date was rescheduled for January 30, 1962."

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* See Records Nos. 5630, 5631, in the Supreme Court of Appeals of Virginia at Richmond, *L. W. Holt* v. *Commonwealth of Virginia* —*E. A. Dawley, Jr.* v. *Commonwealth of Virginia* (red pamphlet), pages 10, 11 and 12:

"(As tendered by L. W. Holt and E. A. Dawley).

"STATEMENT OF FACTS AND INCIDENTS OF TRIAL.

* * *

"8. Because Dawley had not been served with the said Rule to Show Cause prior to January 8, 1962, the trial date was rescheduled for January 30, 1962.

* * *

/s/ E. A. Dawley, Jr.
/s/ L. W. Holt."

My commission expires December 7, 1965.

A true extract—Teste:

Walkley E. Johnson, Clerk,
United States District Court.

by: Glover N. Buck
Deputy

Jordan, Dawley & Holt
Attorneys at Law
721 E. Brambleton Avenue
Norfolk, Virginia

Hence, it appears that petitioners either falsified in their pleading before Judge Lewis or they falsified in the state of facts and incident of trial tendered to Judge Holladay, for in the one they say that Dawley was not served with the show cause order and in the other that he was served.

It would seem that petitioners owe this Court an explanation of the variance between the allegations made before the District Court and the facts as they actually were and are disclosed in this record.

Again, there is nothing in the record to indicate that Judge Holladay did not consider everything which was presented to him by the petitioners in making the motion for a change of venue. We submit that reasonable minds cannot differ as to the motive behind the filing of bare allegations of prejudice, harassment, etc. The court had no other honorable course open; the motion was insulting, and the court dealt with it accordingly.

Judge Holladay had before him the same unsupported allegations that Judge Lewis had and refused to act upon. The difference between the two pleadings is self-evident; in the pleading before the District Court the allegations were directed toward another tribunal—in the pleading before the State court the allegations were directed to the integrity of the judge of that court.

The motion for a change in venue, say the petitioners, was filed for the purpose to avoid trial by Judge Holladay. The record shows that Judge Holladay had overruled Dawley's motion on December 28, 1961, twenty days before the motion for a change of venue was filed, (R. 6). Did the petitioners in good faith believe that the Judge would reverse his prior ruling with nothing to support the allegations in said motion? If they really believed in their motion, then why did they fly to the United States District Court *before* Judge Holladay had an opportunity to pass on said motion?

If there was any real merit to their contention that the Judge was biased, then why did they not have the allegations in the petition supported by affidavits made by disinterested persons? The said motion among other things alleges that the Judge "did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley; viz, Leonard W. Holt." (R. 2). The only specific acts charged to the Judge's conduct is what transpired on January 8, 1962, at which time Holt was *not* representing Dawley. (R. 3, 6). Furthermore, Holt denied he represented Dawley on December 11, 1961. (R. 9). Hence, the only time Holt appeared as counsel for Dawley in this proceeding prior to January 30, 1962, was on October 10, 1961. On that date (October 10), the case was continued to December 11 at Holt's request. The record fails to disclose any form of harassment of Holt on October 11, while he represented Dawley. So all this talk about Judge Holladay harassing and intimidating counsel has no foundation whatsoever and this was known or should have been known to both Dawley and Holt before they villified the Judge in this motion.

How can it be said that the argument made to the Court was not disrespectful or insulting? Judge Holladay who saw and observed the petitioners when the motion was argued found that it was. "I think the plea is contemptuous, the argument contemptuous." (R. 16). "In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing and attitude of the petitioners." *Fisher* v. *Pace*, 336 U. S. 159.

We submit that the motion for a change of venue was neither relevant, presented in good faith or made with respect, and the Supreme Court of Appeals of Virginia was

correct in characterizing it as a vehicle used for the purpose for launching a personal attack upon the integrity or honor of the Court.

Petitioners argue that the case at bar requires a non-summary hearing before a disinterested judge in accordance with the provisions of Federal Rules of Criminal Procedure, Rule 42(b). As the contempt in this case was committed in the presence of the court, the same would be covered under paragraph (a) of said rule,[7] if the rule were applicable in State courts, which we submit it is not. However, it is well to note that the Virginia statute (Section 18.1-292, Code of Virginia (1950)) authorizes summary punishments for contempts committed in the presence of the court just as Rule 42(a) authorizes federal courts to punish for contempt if same is committed in the presence of the court.

There is no provision in the statute, to-wit, Virginia Code Section 18.1-292, or any other statute that provides for disqualification of a judge in a contempt proceeding where the acts of contempt were committed in the presence of the judge. Nor is there a rule issued by the Supreme Court of Appeals covering the subject of contempt similar to Rule 42, Federal Rules of Criminal Procedure. The change of venue statute, to-wit, 19.1-224, Code of Virginia, is certainly not applicable in summary contempt proceedings. In this connection, see, comments of the Supreme Court of Appeals on page 37 of the record:

The Supreme Court of Appeals of Virginia, in answering the argument presented by petitioners for a change in venue and for the disqualification of the Judge, had this to say (205 Va. 339):

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[7] "(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record." Federal Rules of Criminal Procedure, Rule 42 (a).

"The statutory authority for change of venue in criminal cases in Virginia is codified as §19.1-224 of the Code and we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

"Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra*, §13, page 398; 29 A.L.R. 1273."

Virginia follows the general rule that when the contempt is committed in the presence of the court or judge the court may proceed upon its own knowledge of the facts without further proof. Long ago the Supreme Court of Appeals of Virginia, relying on *Ex parte Terry, supra,* and other authorities, affirmed a conviction of contempt resulting from the publication of an article using vicious language against the judge in whose court the contemner had been recently convicted. In the case of *Burdett* v. *Commonwealth* (1904), 103 Va. 838, 48 S. E. 878, 68 L.A. 251, 106 Am. St. Rep., the Court said:

"Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form."

This is the law today in Virginia and was the law when Judge Holladay held petitioners in contempt on January 30, 1962.

C.

The Record Fails To Disclose Any Reason For The Disqualification Of The Trial Judge

We submit that applying the standards governing contempt convictions which this Court has applied in federal cases, there is nothing in this record which indicates that Judge Holladay should have disqualified himself as the action taken by him in holding petitioners in contempt was necessary to maintain the authority and dignity of the Court over which he presided.

On pages 5 and 28 of their brief, counsel for the petitioners go outside the record in their struggle to vindicate the conduct of these petitioners. They tell the Court that the law firm of which the petitioners were partners was embroiled in litigation with the Virginia Legislative Committee on Offenses Against the Administration of Justice before the Federal Court for the Eastern District of Virginia (209 F. Supp. 131) during the fall of 1961. Of course, they failed to connect Judge Holladay with that case because the Judge had nothing at all to do with the same. The incident which precipitated the *Jordan* case (*Jordan* v. *Hutchinson*, 323 F. (2d) 597) occurred in the City of Norfolk, far removed from the City of Hopewell. The bald and unwarranted statement of counsel that the pendency of said case was a related circumstance to the case at bar is not supported by the facts and apparently is a deliberate attempt to prejudice this Court against the Commonwealth of Virginia in *this case*. If counsel's argument is sound then it would mean that the mere existence of said litigation in

the Federal Court by the law firm with which the petitioners were partners would be a license for the petitioners to insult any judge in any State Court throughout Virginia, because all judges throughout Virginia would be charged with the knowledge of such pending case and would thereby be "affected by the prejudice which gripped so many other members of the community." Such an argument is too far fetched to receive serious consideration.

To repeat, there is nothing in this record to indicate to the slightest degree that Judge Holladay was affected by the alleged community prejudice.

II.

Petitioners Were Not Subject To Harassment In This Contempt Proceeding On Account Of Being "Civil Right Lawyers"

We fail to grasp the significance of the petitioners' argument made in this connection. Counsel representing unpopular causes have no greater privileges to practice than counsel in other cases. The adjudication that petitioners were in contempt did not arise in a case while the petitioners were representing "civil rights litigants," whatever that term may mean. Certainly, the mere fact that petitioners as attorneys had represented civil rights litigants in the past gave them no license to use abusive language towards the Judge in pleadings filed and in arguments made.

The written motion for a change of venue was filed on January 17. 1962, some nine days after the last contact the petitioners had with the Judge at the hearing on January 8, 1962. The argument on said motion was made on January 30, 1962, some twenty-two days after said hearing on January 8, 1962. Hence, it is obvious that the petitioners' conduct in this respect amount to a deliberate attack on the

integrity of the court and designed for no other reason than to bring the court in disrepute.

It is the duty of an attorney to refrain from abusive language and maintain a respectful bearing toward the court. Dangel, Contempt, Section 118.

Regardless of how the petitioners may have felt towards the Judge and regardless of how they may have believed that there was a hostile feeling towards them in the community, this constituted no reason to launch a personal attack on the integrity and honesty of the Judge. Certainly, the mere fact that they had represented civil rights litigants in the past gave them no license to do this.

CONCLUSION

Contrary to the contemners' illusion, they were not punished for their advocacy in unpopular causes. Their conviction springs from the concept that courts are entitled to the respect of litigants and lawyers and must be accorded the dignity demanded of that station.

Perhaps the concept is wrong. Conceivably, the framers of that idea erred in the notion that the judicial branch of government must be protected against acrimonious assaults by those displeased with the decisions of the courts or the judges making those decisions.

Possibly, even though valid at the inception of our judicial system, the time has come to change that concept. Although perhaps wedded too long to the idea of sanctity of the Courts, we of Virginia still entertain the belief that the concept was right when enunicated, and nothing has changed over the years to make it less valid today. Irrespective of the popularity of his cause, an advocate in Virginia's courts will be expected to conduct himself with decorum and a respectful attitude.

If an orderly society is to survive; if our system of government is to continue; if the citizen's rights and liabilities are to be adjudicated in a peaceable manner by an impartial arbitrator; the person of that arbitrator, and the forum in which he functions, must be free of personal abuse and assaults by those upon whom the courts are called to sit in judgment.

Admittedly, our judicial branch of government is vested with tremendous power. While necessary to hold that power in check against abuse, it is equally essential that those exercising that power be unfettered by fear and free from personal assaults.

Judges must be at liberty to exercise their best judgment in an atmosphere of dignity without regard to the repercussions of unpopular causes and the clamoring of militant groups and crusading reformers.

Irrespective of the course of other states, the Courts of the Commonwealth of Virginia intend to maintain that atmosphere.

It is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia was clearly right in upholding the action of the Circuit Court of the City of Hopewell, Virginia, in summarily punishing the petitioners for contempt, and that judgment should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Melvin L. Wulf, Esq., Leslie Harold Levinson, Esq., Joseph A. Jordan, Esq., Edward A. Dawley, Esq., and Len W. Holt, Esq., counsel for petitioners, by depositing the same in a United States post office mail box, with first class postage prepaid, at their addresses shown of record to be c/o American Civil Liberties Union, 156 Fifth Avenue, New York 10, New York, and to Marvin M. Karpatkin with first class postage prepaid at his address 660 Madison Avenue, New York, New York, on this 14th day of April, 1965.

D. GARDINER TYLER
Assistant Attorney General